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THE MEMORIAL LECTURE SERIES — 1978

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Myres S. McDougal

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THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW MEMORIAL LECTURES

The University of Mississippi School of Law Memorial Lectures were established in 1973 by the Jackson, Mississippi, law firm of Butler, Snow, O'Mara, Stevens & Cannada to honor the memory of its founding partners, George H. Butler, Sr., Charles B. Snow and J. Morgan Stevens. As specified in the granting document, the purpose of the Lectures is to "provide substantial education enrichment opportunities for the students and faculty of the law school, and such members of the bench, bar and academic community as may appropriately be included."

The theme for the Lectures is "The Role of Law in the Remainder of the Twentieth Century." The Lectures each year exploit this general theme and, through the vehicle of the lecturer's particular subject matter area, explore the influence of law — both potential and actualized — on our civilization.

The Lectures, presented annually at the Law School, are subsequently published by the *Mississippi Law Journal.* They are thus made available to every Mississippi judge and practitioner and to academic law libraries throughout the country.

This year the Lectures are presented by Myres S. McDougal, Sterling Professor of Law Emeritus at Yale University and currently Distinguished Visiting Professor of Law at New York Law School. Born in Burtons, Mississippi, Professor McDougal graduated from the University of Mississippi in 1927, receiving the A.B., A.M. and LL.B. degrees. He then studied at Oxford as a Rhodes Scholar, earning the B.A. and B.C.L. degrees in 1930. The following year he was a Sterling Fellow at the Yale Law School from which he received the J.S.D. degree. His law teaching career was launched in 1931 at the University of Illinois; in 1934, he began his illustrious tenure of more than four decades at Yale. He was appointed William K. Townsend Professor of Law in 1944, and in 1958 was named to a prestigious Sterling Professorship.

During the years since World War II, Professor McDougal has been the most important American influence in the shaping of international law. His most significant achievement has been the development of a new system for teaching, learning and utilizing law: a policy-oriented methodology which perceives "law" as part of the process through which societies organize and pursue human values. The impact of his thinking on the jurisprudence of international law has been profound and determinative; his influence is of world-wide dimension.

A prodigious writer, Professor McDougal has authored or coauthored nearly a dozen notable books including *Studies in World*

Public Order (1960), *Law and Minimum World Public Order* (with Feliciano) (1961), *The Public Order of the Oceans* (with Burke) (1962), *Law and Public Order in Space* (with Lasswell and Vlasic) (1963), and *The Interpretations of Agreements and World Public Order* (with Lasswell and Miller) (1967) ; his articles essays and book reviews literally number in the hundreds and have been published in every important national and international legal journal. The recipient of numerous honorary degrees, Professor McDougal has served as the President of both the American Society of International Law and the Association of American Law Schools.

Dean Parham H. Williams, Jr.
University of Mississippi School of Law

INTERNATIONAL LAW AND THE FUTURE*

*Myres S. McDougal***

"Modern man peers eagerly back into the twilight out of which he has come, in the hope that its faint beams will illuminate the obscurity into which he is going; conversely his aspirations and anxieties about the path which lies before him sharpen his insight into what lies behind . . . . Past, present and future are woven together in an endless chain."[1]

The Relevance of Thinking About the Future

It should require no elaborate demonstration that the founders of these Memorial Lectures, in directing that all lectures be concerned with the role of law in the future, were possessed of very wise insight. In its most useful conception, dating far back into antiquity, law is regarded as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests; in any conception which aspires to keep touch with empirical reality, law must be regarded as making some ultimate reference to decision.[2] The making of any decision of community importance, whether by the criteria of authority or of naked power and whatever the size of the community, requires a choice in the present among future alternatives in action and outcome. It is the distinctive task of lawyers,

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* This Article is a revised version of the Fifth Annual Memorial Law Lectures delivered at the University of Mississippi Law Center on November 15, 16 & 17, 1978. A few first efforts to speak about the future of international law established the impossibility of that task within three hours. What is attempted here is the outlining of a framework of inquiry which, if executed, might make some sense of the study of the future of international law.

In preparing this outline I have drawn upon studies made under a grant from the National Science Foundation (Grant No. SOC 76-22335).

** Sterling Professor of Law, Emeritus, Yale School of Law; Distinguished Visiting Professor of Law, New York Law School.

[1] E. Carr, The New Society 2-3 (1957).

[2] *See generally* Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. Calif. L. Rev. 362 (1971); Lasswell & McDougal, *Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of Inquiry*, 8 U. Tol. L. Rev. 1 (1976). For application of these themes to international law see McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1968).

functionally conceived, both to establish and maintain a community process of authoritative decision and to direct and manage that process to clarify and secure the common interests of community members in demanded values. Hence, however much lawyers may venerate the past and futilely endeavor through the doctrine of precedent to effect its repetition, their primary concern must be effectively to intervene in the present for managing the future on behalf of the communities and private clients they represent.[3] The maxim "governer c'est prévoir" expresses not merely a Gallic but a universal wisdom.[4]

The late Walton Hamilton, a quondam professor in the Yale Law School, was wont to exhort his students that lawyers could not be goofus birds. A goofus bird, he would explain, flew backwards: it liked to know where it had been, but had no care for where it was going. Lawyers, Hamilton insisted, could rationally be concerned with the past only for the light it shed for decision in the present about a preferred future distribution of values.

In recent decades, moved perhaps by an increasing sense of both global community and impending threat, scholars and statesmen alike have exhibited an intensifying concern about the international law of the future, both in general and in relation to specific problems. One early influential general study by Professor Lassa Oppenheim, the author of a classic and still important textbook, was entitled simply "The Future of International Law," and was translated from the German and widely circulated by the Carnegie Endowment for International Peace.[5] At the close of World War II the American Bar Association, under the stimulus of Manley O. Hudson, a former judge of the Permanent Court of International Justice and a professor of law at Harvard, under-

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[3] Michael Reisman has appropriately emphasized that lawyers must continuously make judgments about the future. In Reisman, *Private Armies in a Global War System: Prologue to a Decision,* 14 VA. J. INT'L L. 1, 33 (1973), he writes:

> Lawyers too often overlook the painfully obvious fact that though the events which precipitate decisions come from the past, decisions themselves are future-oriented; the test of their quality is not whether they conform to the past, but rather whether they structure processes and value allocations in the near and distant future in preferred ways.

The important question is whether we can achieve a method of inquiry that will improve the lawyer's assessment of, and intervention in, the future.

[4] This maxim is recalled in D. GABOR, INNOVATIONS: SCIENTIFIC, TECHNOLOGICAL, AND SOCIAL 151 (1970).

[5] L. OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW (1921).

took a much more ambitious collective study entitled "The International Law of the Future: Postulates, Principles, and Proposals."[6] More recently, Sir Gerald Fitzmaurice, a former president of the International Court of Justice, made a Special Report to the prestigious Institut de Droit International upon "The Future of Public International Law and of the International Legal System in the Circumstances of Today."[7] Unhappily, in the light of "the circumstances of today" these studies make somewhat sad reading: the conception of law that inspires them is that of the positivist tradition, which accepts international law only uncomfortably, and they do not systematically locate international law in the larger social and effective power processes of which it is a part and which it in turn affects. The problems anticipated in the earliest studies are not the important problems of today and the solutions suggested, in terms of black-letter rules, approach being quaint. Studies of this type do not appear to offer fruitful models for inquiry about the future.

Of somewhat greater though still incomplete relevance and promise is a vast range of studies of relatively contemporary origin stimulated both by developments in the social sciences and by various kinds of utopian aspiration. The earliest, and perhaps least sophisticated, of these studies are those that formulate and project detailed proposals for centralized "world government," without taking into adequate account all the different features of world processes of effective power which must condition a higher degree of centralization in global constitutive process.[8] The most intellectually sophisticated of contemporary studies are those by "systems" or "limited factor" analysts who hope that by the isolation and manipulation of a number of key variables they can avoid the drudgery of contextuality and perform a number of intellectual tasks relevant to inquiry about global decision pro-

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[6] AMERICAN BAR ASSOCIATION, THE INTERNATIONAL LAW OF THE FUTURE: POSTULATES, PRINCIPLES AND PROPOSALS (separate print, *American Bar Association Journal,* March 25, 1944).

[7] G. Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today, Special Report to the Institut de Droit International* (1973).

[8] Among the most useful of such studies are: G. CLARK & L. SOHN, INTRODUCTION TO WORLD PEACE THROUGH WORLD LAW (rev. ed. L. Sohn 1973); G. CLARK & L. SOHN, WORLD PEACE THROUGH WORLD LAW (1958).

cesses.[9] Lawyers will understand why observers who have an inadequate conception of authority as a factor affecting decision and who hope, in a single set of words, to describe past decisions, to account for the factors affecting decision, to predict future decision and to state what future decision ought to be, have not met with a high degree of success in inquiry.

The many publications by the most recent World Order Models Project[10] appear to combine both the hopes and difficulties of the two earlier kinds of studies: the problems with which these later studies work are not operationally specified in terms of disparities between demanded values and their achievement; the diffuse problems announced are not systematically located within the embracing world social and power processes; and the various intellectual tasks relevant to inquiry and decision are not deliberately and systematically performed.[11] The famous studies by the Club of Rome,[12] whatever the merits of their controversial modelling techniques and whatever the validity of their substantive forecasts, have, like the more modest proposals from the Trilateral Commission,[13] sought and had but a glancing, indirect

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[9] Representative studies are cited and appraised in McDougal, Lasswell, and Reisman, *supra* note 2, at 275-89.

[10] Citations and comparisons with other approaches are offered in Beres, *World Order Orientations to International Law*, 29 W. POL. Q. 29 (1976); Falk, *Contending Approaches to World Order*, 31 J. INT'L AFF. 171 (1977). An amusingly devastating critique appears in Farer, *The Greening of the Globe: A Preliminary Appraisal of the World Order Models Project (WOMP)*, 31 INT'L ORGANIZATIONS 129 (1977).

For a general introduction to the many studies, see S. MENDLOVITZ, ON THE CREATION OF A JUST WORLD ORDER: PREFERRED WORLDS FOR THE 1990's (1975). *See also* R. KOTHARI, FOOTSTEPS INTO THE FUTURE (1974); G. LAGOS & H. GODOY, EVOLUTION OF BEING: A LATIN AMERICAN VIEW OF THE FUTURE (1977); A. MAXRUI, A WORLD FEDERATION OF CULTURES: AN AFRICAN PERSPECTIVE (1976).

[11] *See* K. DEUTSCH, ET AL., PROBLEMS OF WORLD MODELLING: POLITICAL AND SOCIAL IMPLICATIONS (1977). H. ALKER & A. TICKNER, SOME ISSUES RAISED BY PREVIOUS WORLD MODELS, offers an excellent critical review of past efforts toward world modelling. *Id.* at ch. 4.

A more optimistic appraisal appears in Lasswell, *The Promise of the World Order Modelling Movement*, XXIX WORLD POL. 475 (1947).

[12] *See* D. H. MEADOWS, D.L. MEADOWS, J. RANDERS & W. BEHRENS III, THE LIMITS TO GROWTH (1972); M. MESAROVIC & E. PESTEL, MANKIND AT THE TURNING POINT (1974); A. PECCEI, THE HUMAN QUALITY (1977); J. TINBERGEN, ET AL., RIO—RESHAPING THE INTERNATIONAL ORDER (1976). For appraisal, see W. ROSTOW, THE WORLD ECONOMY: HISTORY AND PROSPECT 571 (1978).

[13] One relevant study is Cooper, Kaiser and Kosaka, *Towards a Renovated International System*, in THE TRILATERAL COMMISSION, THE TRIANGLE PAPERS No. 14 (1977). *See also*, Bergsten, *The Reform of International Institutions*, in THE TRILATERAL COMMISSION,

effect upon considerations of the future of international law and protected features of world public order. By far the most useful studies of the future of international law and world public order, upon which we can build, have come from Professor Richard A. Falk, writing alone or in collaboration with Professor Cyril E. Black and others.[14] In an immense flow of books and articles Professor Falk has described our present perils with respect to many public order values and has made very specific suggestions for improvement of the legal processes indispensable to the protection of such values. We may despair of his hope of the creation of an autonomous global law which can reconcile and accomodate incompatible value systems, and disagree with some of his diagnoses and solutions, without rejecting the main thrust of his enterprise.

It is common ground among most observers today that contemporary world public order is undergoing transformations of unprecedented magnitude and scope and that such change is likely to continue at an accelerating rate. The important changes, occurring under the influence of a universalizing and modernizing science and technology, relate to every feature both of the social processes transcending particular community lines and of the processes of authoritative decision by which such social processes are guided and regulated. The continuing transformation in the features of global social process may be observed in terms of changes in the number and characteristics of actors or participants, individual and group; in the values demanded by individual human beings, and their images of the past and the future; in the geographic, temporal, and institutional settings of interaction; in the varying importances of conceptions of authority, resources, knowledge, and other values as bases of power; in shifting emphases upon coercion and persuasion in the management of diplomatic, ideological, economic, and military strategies; and in fluctuations of the different values actually shaped and shared, both as between communities and as among individuals within

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THE TRIANGLE PAPERS No. 11 (1976); Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals,* 84 YALE L.J. 969, 1006 n.92 (1975) (cites many Trilateral Commission papers).

[14] *See* R. FALK, A STUDY OF FUTURE WORLDS (1975); R. FALK, LEGAL ORDER IN A VIOLENT WORLD (1968); R. FALK & C. BLACK (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (1967-1972); R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970); Falk, *supra* note 13.

different communities and on a global scale. The continuing transformation in the features of the global constitutive process of authoritative decision may be observed in terms of changes in participation in decision-making, governmental and other; in the basic policies for which decision process is maintained; in the expansion or contraction of structures of authority; in the rationalization of the procedures for making different types of decisions; and in the different types of decisions actually made in the prescription and application of law for interactions transcending particular communities. So vast are the changes in both these processes, the global social process and the global process of authoritative decision, Professor Falk concludes that we are today in a stage of transition comparable to that in 1648 when, with the Treaty of Westphalia, the more comprehensive public order was moving from feudalism and papal guidance to the nation-state system. In our present stage, Professor Falk finds, we are certainly moving from nation-state predominance to a more pluralistic institutional setting, geographic and functional, with the individual human being playing an increasingly important role and with central guidance coming from an as yet unidentified source.[15] Most importantly, almost all observers today conclude that humankind, the great mass of individual human beings, is affected by an interdependence in the shaping and sharing of all values in a much higher degree than ever before.

It is almost equally common ground among observers today that there is little "inevitability" about the direction, benign or self-destructive, in which future world public order may move. Few still assume, as many Western thinkers are said once to have assumed, that humankind is embarked upon automatic progress toward perpetual peace, the parliament of man, the abolition of disease and poverty, and a heavenly public order of absolute respect for human dignity. Conversely, however, no one has yet been able conclusively to establish that humankind is so irrational that it must of necessity despoil and destroy its planet and eliminate itself in nuclear holocaust.[16] About the only certainty we can even tentatively enjoy, contemporary historians tell us, is that the future will be unlike the past. Thus, E.H. Carr writes

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[15] R. FALK, A STUDY OF FUTURE WORLDS 59-69 (1975).

[16] A good survey of contemporary attitudes is offered by J. McHale in *The Future of the Future* (1971).

that, in history, as contrasted with science, "the presumption is not that the same thing will happen again, but that the same thing will not happen again."[17] He explains:

> In science the drama repeats itself over and over again because the *dramatis personae* are creatures unconscious of the past or inanimate objects. In history the drama cannot repeat itself because the *dramatis personae* at the second performance are already conscious of the prospective *denouement;* the essential condition of the first performance can never be reconstituted.[18]

The prevailing attitude of contemporary observers is well stated by another writer:

> Faith in the inevitability of unilinear progressive development has been considerably undermined in the West by now. It has been replaced by abstract models of alternative futures thought to have been made possible by developmental sequences that have already occurred. Changes in philosophical approaches to scientific methodology, not to speak of the calamitous history of our century, have forced upon us a sharp cleavage between scientific and moral perspectives on the historical process. Present-day Western Thinkers, deprived of a plausible faith in a benign historical Providence, find themselves hoping that a degree of choice or collective "free will" exists, by means of which we may choose from among a number of varying possible futures. Even the austere secularity of "policy analysis" is based on the assumption that some such freedom exists.[19]

It is this indeterminacy about future world public order that presents contemporary humankind with the opportunity, as well as the desperate necessity, to plan and shape a public order more in accord with its demanded values. The great bulk of humankind, thanks to a growing enlightenment and to modern technologies in communication, is beginning to understand today, perhaps for the first time in history, that the different peoples of the world do in fact constitute a single community, bound in an irretrievable interdetermination not merely for simple survival but also in the achievement of all demanded values.[20] The important

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[17] E. Carr, The New Society 6 (1957).

[18] *Id.* at 5-6.

[19] Stanley, *Beyond Progress: Three Post-Political Futures,* in Images of the Future 117, 118 (R. Bundy ed. 1976).

[20] R. Falk, A Study of Future Worlds at xxvi (1975) (point made by Mendlovitz in

question is whether the insight inherent in this contemporary perception of community can be brought to bear, not alone in the single task of forecasting, but in performing all the various intellectual and practical tasks necessary to the planning and shaping of a viable world public order.[21] Humankind, aided by its lawyers, has had an immense and rich experience in planning for and securing the shaping and sharing of values both in local, metropolitan, regional, and national geographic communities and in vast, often transnational, collective enterprises functionally dedicated to such particular values as wealth, religion, enlightenment, skill, and so on. The overriding problem in rational concern about the future of public order is how to bring this experience to bear in clarifying and securing the common interest in a community of global dimensions.

Any serious concern for intervening in and shaping the future features of world public order must of course require the systematic and disciplined employment of a comprehensive set of distinguishable but interrelated intellectual tasks.[22] Even the task of forecasting or prediction, commonly associated with thinking about the future, cannot be effectively performed as a separate and independent operation isolated from all other relevant intel-

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General Introduction).

[21] The necessity for planning is stressed in J. McHALE, *supra* note 16. *See also* S. CLOUGH, BASIC VALUES OF WESTERN CIVILIZATION (1960); Shubik, *Information, Rationality, and Free Choice in a Future Democratic Society,* 96 DAEDALUS 771 (1967).

[22] 1 R. FALK & C. BLACK, (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (1969) states:

> In seeking to make a distinction between eschatology and utopia, and predictions and conjectures based on such objective analysis as is today possible, particular attention should be given to those images of the future that are based on an explanation of the past and present. It is not possible to know even the near future in any detailed or comprehensive sense, but it is possible to identify the institutional continuities, developmental trends, systemic structures, and values, central problems, and relationships of constants and variables that have proven to be reasonably reliable. Even if a forecast does no more than suggest and evaluate a range of possibilities, it limits to this extent the uncertainties that lie ahead.

Id. at 12. Much of the "theory" developed by contemporary political scientists seems to be concerned with the scientific task only and to place an impossible burden upon "theory," unaided by contextual examination. When no clear focus is made upon decision, and when authority is not included among the variables affecting decision, it is not surprising that performance of even the scientific task must struggle. See, for example, Waltz, *Theory of International Relations,* in 8 HANDBOOK OF POLITICAL SCIENCE 1-85 (F. Greenstein & N. Polsby eds. 1975).

lectual tasks.[33] For realistic and useful inquiry, the first task is to know precisely what it is that we seek to anticipate or shape, and what our major goals and commitments are. A second task is historical, that of drawing upon the wisdom of the past: what can we learn from past successes and failures about comparable problems and where do we stand now in approximation to demanded goals. A third task is the scientific, the task so much emphasized in much contemporary "systems" and "limited factor" theorizing: what are the factors that appear to have affected past successes and failures and are these factors likely to have comparable effects in the future. A fourth task focuses explicitly upon forecasting or the projection of future developments: what are possible future developments, assuming no effective intervention, with respect to the specified problems, and what indices of probability can be assigned to the different possibilities. It should be obvious that even reliable forecasting requires, beyond the extrapolation of past trends, the careful evaluation of such trends in the light of scientific knowledge and the potentialities of change. The final task is that of evaluating and inventing alternatives in action that will promote change in the direction of demanded goals. It is not being suggested that these different intellectual tasks can or should be performed in some rigid, innate, chronological order, but rather that all are intimately interrelated, with effective performance of anyone being dependent upon effective performance of the others, and that all are indispensable in rational concern about the future.[24]

From this perspective, it becomes clear that the framework of inquiry appropriate to concern about the future of international law and of the public order that it protects is that same deliberately policy-oriented, problem-solving, and multi-method framework that is most appropriate for effective inquiry about

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[23] One of the best discussions of forecasting is W. ASCHER, FORECASTING: AN APPRAISAL FOR POLICY-MAKERS AND PLANNERS (1978).

Another study offering wise general reflections about methodology is D. ORR & M. SOOROS, THE GLOBAL PREDICAMENT: ECOLOGICAL PERSPECTIVES ON WORLD ORDER (1979).

[24] The interrelations of the different tasks are documented, with bibliography, in G. BREMER & R. BRUNNER, POLITICAL DEVELOPMENT AND CHANGE (1975).

For the interrelations of these tasks, see H. LASSWELL, PREVIEW OF THE POLICY SCIENCES (1971).

One of the more sophisticated studies of the future of law in a particular field is Macneil, *The Many Futures of Contracts*, 47 S. CALIF. L. REV. 69 (1974).

law and public order in any of the lesser communities of the globe. Elsewhere, in collaboration with associates, we have sought to outline in some detail the major features of such a framework of inquiry.[25] These features include, in brief, the establishment of an observational standpoint in identification with the largest relevant community and all its component communities; the systematic formulation of problems in factual terms of disparities between demanded values and their achievement; the postulation of a comprehensive set of recommended community goals; a conception of law in terms not of rules only but of a continuous process of authoritative decision; the relation of authoritative decisions to the larger community social and effective power processes by which such decision is affected and which it in turn affects; and, finally, the systematic employment with respect to specified problems of all relevant intellectual tasks including the detailed clarification of goals, the description of past trends in decision in terms of approximation to clarified goals, the analysis of conditions affecting decision, the projection of possible future developments, and the invention and evaluation of appropriate alternatives in decision.

In these lectures the most that I can hope to achieve is to suggest, and perhaps modestly to illustrate, how a deliberately policy-oriented framework of inquiry might be employed, in greater comprehensiveness and detail, in exploration of the potentials of law for coping with some of the more important emerging problems in contemporary world public order. In pursuit of this not unambitious enterprise, I propose to proceed, seriatim, through the following headings:

I. The Global Focus: The Transnational Character and the Interdetermination of Contemporary Problems

II. The Postulated Goals of a World Public Order of Human Dignity: The Clarification of Basic Community Polities

III. The Role of Authoritative Decision in Clarifying and Securing Common Interest: International Law in Policy-Oriented Conception

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[25] See references in note 2 *supra*. A comprehensive bibliography by F.W. Tipson is appended to TOWARD WORLD ORDER AND HUMAN DIGNITY (W. Reisman & B. Weston eds. 1976).

IV. The Main Features of Contemporary Global Constitutive Process and Public Order
V. The Conditions Affecting World Public Order
VI. Possible Futures in World Public Order
VII. Alternatives for an Optimum Future World Public Order

I. The Global Focus: The Transnational Character and Interdetermination of Particular Problems

From his vantage point in Apollo 8, Frank Borman is reputed to have made this observation about the "unity of the world":

> The view of the earth from the moon fascinated me—a small disk, 240,000 miles away. It was hard to think that that little thing held so many problems, so many frustrations. Raging nationalistic interests, famines, wars, pestilence don't show from that distance. I'm convinced that some wayward stranger in a spacecraft, coming from some other part of the heavens, could look at earth and never know that it was inhabited at all. But the same wayward stranger would certainly know instinctively that if the earth were inhabited, then the destinies of all who lived on it must inevitably be interwoven and joined. We are one hunk of ground, water, air, clouds, floating around in space. From out there it really is "one world."[26]

From any anthropological perspective, it is easy to observe that humankind is today confronted with not merely some important transnational problems, but that practically all of humankind's important problems are transnational and interconnected in origin and impact.[27] Because of this transnational origin and interdetermination in impact any effective and continuing solutions for these problems must be equally transnational and comprehensive. For economic recall, some of these more important problems may be indicated in tabular form, first with regard to the major features of the larger landscape of global social process,

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[26] The source of this quote has escaped my filing system.

[27] A popular overview of problems is offered in such books as H. Blaney III, Global Challenges (1979); L. Brown, World Without Borders: The Interdependence of Nations (1972); S. Brown, New Forces in World Politics (1974); R. Falk, This Endangered Planet (1971); R. Heilbroner, An Inquiry Into the Human Prospect (1975); A. Peccei, The Chasm Ahead (1969); Tinbergen, *The Need for an Ambitious Innovation of the World Order*, 31 J. Int'l Aff. 305 (1977).

and secondly, with regard to particular value processes within the larger process.

A. Problems Related to Major Features of Global Social Process

1. *Security*

(Whether defined in terms of *minimum order,* the prevention of unauthorized coercion, or of *optimum order,* the maintenance of high position, potential and expectation with respect to all values)

Continuing confrontations of the major powers, with rising expectations of violence. Threats of nuclear destruction and of chemical and biological warfare. The acquisition of contemporary instruments of destruction by smaller powers. The rise and spread of private violence and terrorism.

2. *Environment*

The spoliation, pollution, and exhaustion of resources at an accelerating rate. Increasing violation of physical and engineering unities in the use of resources. The growing monopolization of sharable resources, with restraint upon scientific inquiry about resources. The promise and threat of both deliberate and accidental climate and weather modification. The continuing diversion of important resources to destructive purposes.

3. *Population*

The accelerating rate of increase in population growth. The uneven distribution of peoples in relation to resources and increasing barriers to migration.

4. *Institutions*

The antiquated nation-state structures, with their disregard of physical, engineering, and utilization unities. The continuing weakness of international governmental organizations. The lack of development of functional transnational associations devoted to values other than power and wealth. The relative immunization of wealth associations from transnational authority.

B. Problems Related to Different Value Processes Within Global Social Process

1. *Power*

The retreat of democracy and rise of totalitarianism within many different communities. The increasing centralization, concentration, and bureaucratization of power even within nominally democratic communities. The increasing monopolization of the effective bases of power within different communities.

2. *Wealth*

The continued prevalence of individual poverty. Unequal distribution of wealth both within and across community lines. Inadequate regulation of a transnational monetary unit. Governmental interferences with trade. Arbitrary seizures and confiscations of property rights. Irrational allocations of resources and unequal development. Continuing cycles of depression and inflation.

3. *Respect*

Widespread denials of individual freedom of choice about social roles. Increasing individual differentiations and group hatreds upon grounds (race, sex, religion, language, nationality, age) irrelevant to individual capabilities and contributions. Massive encroachments upon individual autonomy and privacy through modern technology and increasing governmental bureaucratization.

4. *Well-Being (Health)*

Continuing high mortality rate and low life expectancy in many parts of the world. Increasing threats of famine, epidemics, and disease. Indiscriminate mass killings in armed conflict and other interactions. The globalization of torture as a deliberate instrument of policy.

5. *Enlightenment*

Continuing high rates of illiteracy and differential access to information in many communities. Deliberate fabrica-

tions and disseminations of misinformation. Wholesale indoctrinations and brainwashings. The withholding and suppression of the information necessary to independent appraisals of policy.

6. *Skill*

The unequal distribution of skills in modern technology and the rapid obsolescence of skills by changes in technology. The brain drain from the developing countries to the developed. Restrictions upon the freedoms of skill groups to organize and to function.

7. *Affection (Loyalties)*

The requisition of loyalties in the name of the state and the undermining of more universal loyalties. Severe restrictions upon freedom of association. Governmental frustration of congenial personal relations and employment of social ostracism as sanctions.

8. *Rectitude*

Denials of freedom to worship and choose secular criteria of responsibility. The politicization of rectitude. Restrictions upon association for religious purposes and intolerance and persecution of religious minorities.

It is the interdependences of all peoples upon a global scale within any particular value process that establishes that all of humankind's contemporary problems are transnational in origin and impact and, hence, require transnational solutions.[28] These interdependences may be easily indicated for any categorization of particular values. Thus, with respect to *power*, all too recent history makes it clear that how power is structured internally within a community affects how that community seeks to exercise power in the global arena. In a comprehensive arena in which humankind is threatened and intimidated by mass destruction weapons, and in which states' elites are obsessed by expectations

[28] These interdependences are systematically developed in M. McDOUGAL, H. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER [hereinafter cited as HUMAN RIGHTS AND WORLD PUBLIC ORDER].

of impending violence, every proposed measure of cooperation about wealth, enlightenment, and other values will be appraised in terms of possible effects upon fighting power and defense capability; the respect for individual human dignity that even a democratic state can maintain is in measure a function of its position in the more inclusive arena. The interdependences of the global *wealth* process are dramatically documented in the pervasive dislocations of an unstable monetary unit and the world-wide sweep of alternating economic depression and inflation. The spread of epidemics and the poisoning of resources, as affecting *well-being,* have never been known to respect the artificial boundaries of nation-states. *Enlightenment* about world-wide interdependences and the demands, identifications, and expectations of other peoples is clearly indispensable to rational decisions about security, power, and other values. In a context of universalizing science and technology, *skills* developed in one community travel at increasing tempo throughout the globe. As transnational mobility expands, changes in *loyalties* to individuals and groups are increasingly broadside in impact. Much of the armed conflict in the world today, ignoring all geographic boundaries, exhibits deep religious and other *rectitude* motivations. With regard to *respect,* finally, one important factor in contemporary world politics affecting every decision is the accumulated resentment of millions of individuals caused by long endured discriminations, deprivations and humiliations.

It is the interdependences between different value processes (effects of power upon wealth, of wealth upon power, and so on) upon a global scale that establishes the interconnectedness, or inescapable interdetermination, of all of humankind's contemporary problems and their solutions. In a recent study of human rights, in collaboration with associates, we have documented interdependences of this type with regard to a number of representative value processes. In initial demonstration, we wrote:

> Thus, the *power* of any participant in the world arena is obviously influenced by the levels of physical and mental *well-being* within its own community and in other communities. Since rational decision making is unattainable without access to a flow of comprehensive, dependable and pertinent knowledge and information, the dependence of *power* upon the production and distribution of *enlightenment* is evident. The influence of *wealth* on *power* is indicated by the changing roles of industrial-

> ism and the allocation of resources in the contemporary world, as exemplified by the dramatic upsurge of the influence on the part of OPEC countries in the wake of the global energy crisis. The impact of *respect* on *power* has been cogently demonstrated by the postwar movements of decolonization and nation building . . . . The effect of *skill* is occasionally decisive and always significant. In modern polities the dissolution of traditional patterns of authority and control created vast audiences of conflict-ridden persons eager to find a new world view. Hence specialists upon mass communication are able to exploit their propaganda skills on behalf of nationalism, proletarianism, anarchism and other rival ideologies. *Power* is, similarly, affected by the pattern of *affection* and loyalties in society. The component groupings in society often conflict with one another to control the sentiments of the individual . . . . Finally, *power* is modified by effective conceptions of *rectitude.* Unhappy recent events make it clear the confrontations and confusions in *rectitude* standards (*e.g.*, whether waging a particular war is morally just or unjust) can frustrate the fighting will and capability of a great power to conduct a war.[29]

A comparable demonstration could be made, and has been made, with regard to all other important value processes.[30]

If the intellectual tasks necessary to affecting the future features of world public order are effectively and economically to be performed, it is indispensable that we seek a much more precise and detailed formulation of problems than that employed in the somewhat impressionistic and synoptic presentation above.[31] It is one of the tenents of a policy-oriented framework of inquiry that particular problems are most effectively and economically formulated in terms of disparities between demanded values and their achievement in community process. When problems are explicitly, comprehensively, and sharply formulated in terms of social process events, comparable through time and across community boundaries, it may become possible to achieve a detailed clarifi-

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[29] *Id.* at 47-63.

[30] *Id.* at 53-54.

[31] Unhappily, many books written from political science perspectives offer little more than anecdotal information. Without carefully defined value and institutional categories for the specification of problems, they achieve little general theory and proffer a most inadequate theory for performance even of the scientific task. For examples, see R. KEOANE & J. NYE, POWER AND INTERDEPENDENCE (1977); S. HOFFMAN, PRIMACY OR WORLD ORDER (1978).

cation of basic community policies in relation to particular problems, to appraise past trends in decision in terms of their approximation to preferred policies, to identify the important predispositional and environmental factors affecting decisions and outcomes, to estimate the probable costs and benefits of the different options in decision to common interest, and to devise alternatives in decision better designed to serve preferred community policies.

A principal difficulty of the World Order Models Project, for illustration, is that it has not achieved an economic categorization of problems. The problems specified in many studies are "war, poverty, social injustice, environmental decay, and alienation." These problems are apparently derived from values—"peace, economic well-being, social justice, ecological stability, and positive identity"—which are neither comprehensive nor homogeneous and which make reference to a confused maze of institutional details.[32] The particular categorizations appear to have been chosen because of their acceptability in different cultures. It is recognized by Professor Mendlovitz, the principal director of the Project, that these problems are "vaguely operationalized," but he asserts that this is irrelevant.[33] The fact is of course that the way problems are operationalized is of the utmost importance to the outcome of inquiry. What is needed are formulations that are acceptable as matters not merely of taste to different cultures, but which can be made to transcend differences in culture, community, and time in a way to facilitate the comparisons in goal, trend, and condition indispensable to creativity. It will be an accident if studies that do not adequately operationalize problems make enduring contribution.

The mode of operationalizing problems that we would recommend begins with the adoption of a set of value categories taken from ethical philosophers and other normative specialists—such as power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude—with supplementation by a set of institutional practices borrowed from cultural anthropologists—such as participation, perspectives, situations, base values, strategies, and outcomes. By employment of appropriate operational indices the value categories can be made completely comprehensive. By employment of the institutional practices as such operational

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[32] S. Mendlovitz, *supra* note 10, at xii.

[33] *Id.*

indices, inquiry may be made as detailed as may be required. Problems in authoritative decision, as integral components of power processes, can be described in terms of decision-makers, basic policies, structures of authority, bases of power, strategies, and decision outcomes. In our study of human rights we have proffered a comprehensive outline, too voluminous to be reproduced in a lecture, of both public order and constitutive decision problems in these terms.[34] If our thesis that there is a human rights dimension in every social interaction and every authoritative decision is correct, then at least a comparable outline might be adapted to broader purposes.

II. The Postulated Goals of a World Public Order to Human Dignity: The Clarification of Basic Community Policies

The first task for one who would shape features of future world public order, as of any social process, is, of course, to be clear about major goals or commitments and to command intellectual procedures for relating high-level goals to particular instances of choice. A clear sense of direction is necessary to the effective performance of all relevant intellectual tasks, and a comprehensive map of fundamental preferences is indispensable to rational calculation of the costs and benefits of different alternatives in decision.

One who is committed to the values of human dignity will, because of the demands he makes upon himself for a democratic sharing of power, seek in his most basic postulation of goals to incorporate the value demands most widely held within his community insofar as these demands are compatible with the values of human dignity. Happily, contemporary global social process does exhibit many peoples, widely dispersed in different territorial communities and cultures, making "rising common demands" for the greater production and wider sharing of all those values today commonly described as of human dignity.[35] Though

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[34] Human Rights and World Public Order, *supra* note 28, at ch. 3. *See also* McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 Va. J. Int'l L. 387 (1974).

[35] These demands are described and documented in Human Rights and World Public Order, *supra* note 28, at ch. 1. *See also* E. Lazlo, et al., Goals for Mankind (1977) (a report to the Club of Rome on the New Horizons of Global Community); J. McHale & M. McHale, Basic Human Needs (1978).

the words "human dignity" are asserted to be of relatively recent origin, the image of man as capable of respecting himself and others, and of participating constructively in a more abundant shaping and sharing of human dignity values, is a culmination of many converging trends in thought, both secular and religious, extending far back into antiquity and coming down through the centuries with expanding cultural and geographic reach.[36] Hence, we assert no arbitrary and idiosyncratic preferences when we recommend for deliberate postulation in inquiry and decision all those values recently transformed into authoritative global community prescription in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights and its Protocol, and International Covenant on Economic, Social, and Cultural Rights, and a whole host of ancillary expressions, general, regional, and national. This emerging global Bill of Rights can indeed be perhaps most aptly described as an intense postulation and commitment by most of humankind.[37]

Upon close examination the prescriptions in the emerging global Bill of Rights will be seen, as in any bill of rights, to be both complementary in form and highly ambiguous in particular terms. In a pluralistic society of scarce resources that honors many values, these qualities are both desirable and inevitable. The basic thrust of all the new prescriptions is, however, in accordance with the dictates of human dignity, toward the greater production and widest possible distribution of all important values, with a high priority accorded persuasion over coercion in the modalities of production and distribution. By the employment of appropriate operational indices for high-level terms, these prescriptions may be administered to honor a very great diversity, in different territorial communities and cultures, in the institutional practices by which values are sought and secured. When overriding goals are appropriately maintained, experimentation and creativity may be encouraged by the honoring of a wide range

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[36] This theme is developed in detail in HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 5. An excellent historical survey is H. BAKER, THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE (1961).

[37] For more detailed exposition, see HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 4.

of functional equivalents in institutional practices.

The opportunity of contemporary scholars and decision-makers is to build upon these new prescriptions to achieve a map of preferred values and institutional practices that can be made as comprehensive and detailed in reference as occasion and particular problems may require. Toward this end we would recommend systematic employment of the same set of value categories (power, respect, enlightenment, well-being, wealth, skill, affection, and rectitude) and of the same set of institutional practice or phase categories (participation, perspectives, situations, base values, strategies, and outcomes) that were suggested above for employment in the specification of particular problems.

The most comprehensive and detailed specification of presumptive preferences about world public order must extend beyond the general projection of high levels of production and a wide sharing of benefits in all value processes to an itemization of preferences value by value and phase by phase within each value process. The kind of outline that might be employed in the more detailed specification of postulated goals with respect to any particular value process may be indicated in tabular presentation:[38]

Outcomes

Achievement of an optimum aggregate in the shaping and sharing of the value;
Access to a fundamental share of benefits;
Enjoyment of further benefits on the basis of merit and contribution;

Participation

Widest possible access compatible with other overriding community values;
Freedom from discrimination irrelevant to merit;
Freedom to form and join groups;

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[38] This table is taken from *id.* at ch. 5. In this chapter we offer some illustration of possible policies with respect to both public order and constitutive process.

Perspectives

Freedom to acquire demands for the value;
Opportunity to discover latent capabilities for participation;
Opportunity to acquire capabilities;
Opportunity to exercise capabilities;
Freedom to establish and change identifications;
Opportunity to achieve realism in expectations;

Situations

Freedom from interference in initiating and constituting institutions;
The establishment and maintenance of specialized and nonspecialized institutions, adequate to maximize human potentials;
Freedom of access to appropriate institutions;
Compulsory access when necessary to responsibility;
Freedom from deprivations disproportionate to crises;
Optimum adjustment of institutions in space (territorially and pluralistically) and through time for the realization of purposes above;

Base Values

Access to authoritative decision to defend and fulfill all rights;
Access to controlling value processes;
Basic minimum;
Equal access (protection against monopolization);
Opportunity for continuing accumulation of the value;
Special assistance to overcome handicaps in achieving access;

Strategies

Freedom to employ effective strategies in the shaping and sharing of the value;
Preference for persuasive, rather than coercive, strategies;
Freedom from discriminatory strategies.

By employment of some such outline with regard to all cherished

values, scholars and decision-makers might be able to achieve a more comprehensive map of their fundamental preferences about features of world public order and, hence, to increase the rationality of their calculations in appraisal of the costs and benefits of different options in the making of particular decisions.

The global constitutive process of authoritative decision, as a component of the global process of effective power, admits of clarification through precisely the same modalities. The literatures of political thought, jurisprudence, and international law are vast reservoirs of potential preferred policies with respect to every phase of constitutive process. The suggestion we make is that the quality of all decision functions might be greatly improved if scholars and decision-makers gave more attention to making completely explicit their more fundamental preconceptions about every feature of constitutive process.

Broad postulations of fundamental preferences about either public order or decision process do not, of course, automatically apply themselves in particular instances. For the relation of high level preferences, inevitably both complementary and ambiguous, to particular instances of choice in context, decision-makers require detailed principles of application, both of content and procedure: Principles of content to specify the features of social interaction, claim to authority, and authoritative decisions deserving attention; and principles of procedure to offer an ecomonic agenda and techniques for bringing pertinent content under observation. For lawyers with a long and rich experience in developing and employing principles for the application of international agreements, constitutions, statutes, precedents, and custom, the task of inventing appropriate principles to relate high-level preferences to specific choices can cause no insuperable difficulty.[39]

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[39] For an indication of possibilities, see HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 5; M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967); McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo* (Ass'n of the Bar of the City of New York, 1978).

III. The Role of Authoritative Decision in Clarifying and Securing Common Interest: International Law in Policy-Oriented Conception

It is easiest to understand international law by recalling our notions of law in any community. It has already been suggested that, in one ancient tradition, law is best regarded as a process of authoritative decision in which the members of a community collectively—through the careful articulation of shared demands and expectations and the employment of many different institutions and intellectual procedures—seek to clarify and secure their common interests. By a community we make reference to any territorial grouping within which the members are constrained by interdeterminations or interdependences in the shaping and sharing of values. In any particular community there can be observed, among its value processes, a process of effective power in the sense that decisions are made and enforced, by severe deprivations or high indulgences, irrespective of the immediate wishes of the targets of decision. Upon close examination these effective power decisions may be observed to be of two different kinds: first, those that are taken by sheer naked power or calculations of expediency; and second, those that are made in accordance with community expectations about how, and with what content, they should be made. It is these latter authoritative decisions, those made in accordance with community expectation and disposing of enough effective power to be put into controlling practice, that, we suggest, are in any community most appropriately regarded as law.

A careful examination of the comprehensive process of authoritative decision within any particular community will reveal that this process, also, is made up of two different kinds of decisions. There are the decisions that establish and maintain the process of authoritative decision and there are the decisions made by this process in controlling and regulating the different value processes within the community. Decisions of the first type identify and characterize authoritative decision-makers, state and specify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for the making of different kinds of decisions, and secure the performance of all the various kinds of decisions (intelligence, promoting, prescription, invocation, ap-

plication, termination and appraisal) necessary to the effective administration of community policies. These are the decisions that we label "constitutive," with reference obviously somewhat broader than the more traditional word "constitutional." The second kind of decision, which for convenience, we may call "public order," emerging in continuous flow from constitutive process, are those that determine how resources are allocated, planned, developed, and employed, and how wealth is produced and distributed, how human rights are promoted and protected, or not protected from deprivation, how enlightenment is encouraged or blighted, how health is fostered or neglected, how rectitude and civic responsibility are matured or repressed, and so on through the whole gamut of community values. Any comprehensive inquiry about the law, past or future, of a community must accordingly take into account the entire flow within that community of both constitutive and public order decisions.

It will be no news to many of you that our inherited schools of, or emphases in, jurisprudence have had the greatest difficulty in establishing an appropriate conception of and framework of inquiry about international law.[40] The earliest frame of reference, the natural law, with its notions of a larger community of humankind and of a common human nature transcending different communities, did of course make immense contribution to the origin and development of transcommunity perspectives of law. Its conception of authority, however, was characteristically in terms of religious or metaphysical absolutes that could be differently interpreted; its concern with control was largely in terms of appeals from naked power to its transempirical conceptions of authority;

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[40] Much more detail upon this theme, with relevant citations to the different schools, is offered in McDougal, Lasswell & Reisman, *supra* note 2. The best traditional history is perhaps W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954). *See also* L. HENKIN, HOW NATIONS BEHAVE (1968); R. HIGGINS, CONFLICT OF INTERESTS (1965); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961); G. NEIMEYER, LAW WITHOUT FORCE (1941); A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (rev. ed. 1954); G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER (1971); Almond, *The Struggle for a World Legal Order: An Overview of An Adversary Process*, 61 MARQ. L. REV. 1 (1977); Johnston, *The Scottish Tradition in International Law*, 16 CAN. Y.B. INT'L L. 3 (1978); Lipson, *International Law*, 8 HANDBOOK OF POL. SCI. 415 (F. Greenstein & N. Polsby eds. 1975).

Some of the difficulties in clarifying a transnational common interest are emphasized, perhaps over-emphasized, in A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971).

and its methods of inquiry emphasized syntactic derivation, along with other mysterious modes of consulting the oracles. It was not, and is not, a frame of reference designed to guide inquiry about empirical decision. The historical frame of reference, with its highly parochial conceptions of unique national communities and of law as some mystic force endlessly and uncontrollably spewing—like language, music, and art—from within these unique communities, is of course completely antithetical to any genuine understanding of international law.

The frame of reference that has been most detrimental to effective inquiry about international law is, however, the positivist or analytical school. The principal tenet of this school, it will be remembered, is that the nation-state constitutes the principal community of humankind and that authority and control, "law," are to be found in the perspectives, "commands," of nation-state officials. Since the proponents of this theory can observe no "sovereign" global state with centralized legislative, executive, and judicial institutions, it becomes within their syntax an apparent contradiction in terms to refer to international law as law. Somewhat disturbed by the obvious disparity between their syntax and the realistic role of authority in transnational interactions, proponents of the theory have sought to cope with their contradiction in three different ways: by a dualism, which asserts that both national and international law are "law," but with completely different decision-makers, policies, and structures of authority; by a monism, which grounds authority in some postulated grund-norm on a global level, and asserts that this grund-norm, by some mysterious derivational magic, dictates the content of the law of all lesser communities; and, finally, by a "non-law" bias, which asserts flatly that since international law does not, in obedience to John Austin's specifications, derive from a "sovereign" source, it cannot be law. Yet, all these positions, observably, remain in patent conflict with the facts of transnational life. The same state officials who prescribe and apply national law are the most important officials in transnational processes of authoritative decision, pursuing much the same policies in much the same structures of authority. It is yet to be demonstrated that all the different intellectual and practical tasks that must be performed in transnational processes of authoritative decision can be effected by logical derivation from a single grund-

norm, explicitly denied relation to processes of effective power. Though some decisions in global interaction are still taken, as in lesser communities, by naked power, many important decisions are increasingly taken from perspecives of authority, that is, in accordance with expectations of members of the larger community about how decisions will be taken. It is not the immediate threat of naked power, but rather the perception of common interest—with its promise and threat in reciprocity and retaliation—that affords ultimate sanction for international law, as for most law.

Similarly, the sociological frame of reference, despite its formal emphasis upon search for the causes and consequences of law, has made but little contribution to inquiry about international law. In too great dependence upon the positivist school, most of the proponents of this frame continue to regard the relevant community as that composed of nation-states and to define international law as a "body of rules" that governs the interrelations between nation-states. Often concerned primarily with effective power, they can find little role for rules as expressions of authority and, without an observational standpoint independent of that of nation-state officials, they have difficulty in identifying a common interest for the guidance of decision. Even the most realistic of the proponents of this frame, such as Weber and Timasheff, accept the positivist notion that authority and control must come from organized and centralized institutions, and hence have difficulty in making an appropriate place for international law. Only Georges Scelle, who built upon Grotius as well as the cultural anthropoligists, could observe, in his notion of a dedoublement fonctionelle that the fact that in transnational decision state officials must be alternatively both claimants and judges affords opportunity for, and requires, even in an unorganized arena, through the potentialities of reciprocity and retaliation a genuine effort to clarify the net advantage in common interest.

In recent decades, happily, there has been increasing recognition that international, or perhaps better transnational,[41] law in

[41] In TRANSNATIONAL LAW (1956), Judge Philip Jessup wrote: "I shall use instead of 'international law,' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." *Id.* at

the global community is very much like law in any community, with some slow movement toward employment of that frame of reference which we described above as "deliberately policy-oriented, problem-solving, and multi-method" for inquiry about the role of law in the larger community.[42] In this frame of reference, the observational standpoint assumed is that of a citizen of the larger community of humankind who identifies with the whole of that community and seeks to clarify and secure the common interests of its members. Authority is conceived in terms of community expectations about future decision, and control in terms of actual participation in decision. Both authority and control are regarded as of empirical reference, admitting of detailed inquiry: there is no need for any infinitely regressive search for the "basis of obligation" in international law; one has only, as Bentham adjured long ago, to open one's eyes and observe transnational expectations about future decision and transnational practices in control. International law is defined in terms, not merely of the rules that officials use in explaining and justifying decision, but as decision that combines use authority and control, and as a continuous flow of decision with transnational impacts which establishes both a constitutive process and public order. Systematic efforts are made to relate problems, claims to authoritative decision, and authoritative decision itself to the larger global community value processes of which they are a part and which they in turn affect. Relevant inquiry, finally, whether for scholarly purposes or guidance of decision, is regarded as extend-

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3; *cf.* McDonald, Morris & Johnston, *The New Lawyer in A Transnational World,* 25 U. Toronto L.J. 343 (1975). The germs of a comparable view appear in McDougal, *The Role of Law in World Politics,* 20 Miss. L.J. 253 (1949).

With reference to what is sometimes described as private international law, see L. McDougal, *The New Frontiers in Choice of Law—Trans-State Laws: The Need Demonstrated in Theory and in the Context of Motor Vehicle Guest-Host Controversies,* 53 Tulane L. Rev. 731 (1979), and L. McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory,* 51 Tulane L. Rev. 207 (1977).

[42] P. Corbett, The Growth of World Law (1971); R. Falk, The Status of Law in International Society (1970); W. Gould & M. Barkun, International Law and the Social Sciences (1970); C. Jenks, The Common Law of Mankind (1968); J. Moore, Law and the Indo-China War (1972); Claydon, *Canadian Perspectives on International Law and Organization: Toward an Expanding Role in World Order,* 2 Dalhousie L.J. 533 (1975); Tipson, *From International Law to World Public Order: Who Studies What, How, When,* 4 Yale Stud. in W.P.O. 39 (1977); F. Tipson, Consolidating World Public Order: The American Study of International Law and the Work of Harold D. Lasswell and Myres S. McDougal, 1906-1976. (unpublished Ph.D. thesis, University of Virginia, 1977).

ing beyond derivational exercises to include all the intellectual tasks necessary to the clarification and securing of community policy.

A policy-oriented framework of inquiry has, thus, no difficulty in observing, as we have already in some measure documented, that humankind does today constitute a global or earth-space community, entirely comparable to its internal component communities, in the sense of interdetermination and interdependences in the shaping and sharing of values.[43] It is the larger community process, composed of many different and interpenetrating lesser community processes, which stimulates claims to authoritative decision, affects the process of decision, and is in turn affected by decision. It is, hence, indispensable to effective inquiry to have a realistic map or model of the larger global process. The major features of the larger global community process may be roughly mapped in the categorizations recommended for the description of any value process.[44] We illustrate:

Participation

> The actors in global community process include not merely "nation-states" but individual human beings and all their groups, both functional and territorial, private and governmental, organized and unorganized. These individual human beings are multiplying at an accelerating rate and employ many changing patterns in the making, managing, and unmaking of their different groups. Convenient categorizations of organized groups include governments, political parties, pressure groups, and private associations devoted to different values. Unorganized groupings include culture, class, interest and personality.

Perspectives

> The "rising common demands" of individuals from every segment of the globe for greater participation in the

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[43] *See* R. COBB & C. ELDER, INTERNATIONAL COMMUNITY: A REGIONAL AND GLOBAL STUDY (1970); R. STERLING, MACROPOLITICS: INTERNATIONAL RELATIONS IN A GLOBAL SOCIETY (1974); Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L.J. 887 (1946).

[44] In the summaries that follow I draw upon collaborative work, both published and unpublished, with Michael Reisman, Lung-chu Chen, the late Harold Lasswell and other associates.

shaping and sharing of all values have been widely documented. The identifications of particular individuals with other individuals about the globe exhibit wide fluctuations, in expansion or contraction, based on many different grounds. The expectations of individuals about the conditions that affect the achievement of their demands—the degree, for example, of their perception of community—vary greatly both in comprehensiveness and realism.

Situations

Transnational interactions in every value process are increasing in frequency, intensity, and range of impact at an ever accelerating rate. With the practical annihilation by technology of distance, and with the new access to outer space, the geographic ramifications of interaction are in constant flux. Through instantaneous global communication time has been compressed and the larger community made for many purposes a single open forum. In a technologically differentiated society, all activities manifest a persistent trend toward greater centralization, concentration, bureaucratization, and regimentation. The shadow of nuclear war and lesser threats of large-scale, impending deprivations with respect to all values create a constant state of crisis for all interaction.

Base Values

While any value may potentially serve as a base for the shaping and sharing of other values, enlightenment and skill become increasingly important as science and technology advance. The significance of resources and features of the physical environment, as potential values, requires continual reassessment in the light of science and technology. The importance of authority in promoting and stabilizing interaction varies with the effectiveness of constitutive processes within all the different interpenetrating communities. Both values and potential values are most uneconomically distributed both within particular communities and across particular community lines.

Strategies

The strategies invoked by actors in managing base values include all contemporary instruments of policy—commonly characterized as diplomatic, ideological, economic, and military—and these are employed both singly and in combination, and with many differing degrees in persuasion and coercion, for both production and destruction of values. The potentialities of the diplomatic, and ideological in the management of symbols and perspectives, and of the economic and military in the management of resources and capabilities, are, again, constantly changing with knowledge, skill, and other features of the context.

Outcomes

The outcomes of the most comprehensive process of interaction may be observed in a flow of indulgences and deprivations with regard to all values, as manifested in varying patterns of accumulation and distribution and in different impacts upon different individuals, groups and particular communities. From a long historical perspective, the trend would appear to be toward a greater production and wider distribution of all values; yet it is obvious that the contemporary global community has scarcely begun to mobilize its full potential for meeting the "rising common demands" of humankind. The point of present relevance—for establishing a global community—is that all individual human beings, whatever their varying group memberships, can be observed to be completely interdependent—because of the interdeterminations outlined above both within any particular value process and as between all value processes—in the shaping and sharing of all values. What any one individual can get for himself and those with whom he identifies is in the long run a function of what all other individuals can get.

Through a policy-oriented framework of inquiry, one has, further, no difficulty in observing that one most important component of global community process is a process of effective power, equally global in its reach. It is this process of effective

power that both controls or affects interactions in social process without regard to the requirements of authority and establishes a global constitutive process of authoritative decision for the promotion and stabilization of a more economic and humane social process.[45] It is this process of effective power, to specify its importance in more detail, which establishes the basic policies for which constitutive process is maintained and managed. For the mapping of effective power, it is convenient, again, to employ the same categorizations suggested for any value process. We illustrate:

Participation

The nation-state, specialized to demanding power, is still the most conspicuous wielder of effective power in the global arena. The nation-states of the world are, however, no longer compartmentalized, isolated boxes; they operate in everchanging groupings and coalitions and are interpenetrated by multiplying pluralistic groupings. Nuclear weapons may be making the present territorial structure of the world arena as obsolescent as the cannon ball made walled cities. Through their bases in transnational authority, international governmental organizations play an increasingly important role. A vast network of political parties, pressure groups, and private associations (primarily dedicated to values other than power), of varying geographic reach, increasingly achieve power outcomes.

Perspectives

The demands for power in the name of particular nation-states and the ideological splits between democratic and totalitarian states, as well as between developed and developing states, continue to handicap the discovery of common interest. The identifications and loyalties of individuals, still largely affixed to particular nation-states, remain parochial and fragmented, without

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[45] One useful introduction is G. MODELSKI, PRINCIPLES OF WORLD POLITICS (1972). *See* G. SCHWARZENBERGER, POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY (2d rev. ed. 1951).

adequate perception of larger community. The expectation is pervasive that conflicts between major states will ultimately be settled by violence. The calculation of the advantages and disadvantages of alternative strategies continues to reflect the special interests of particular states.

Situations

The inherited territorial structuring of the world arena is only precariously stabilized, with a continual balancing and rebalancing of major powers in bipolar, tripolar, and multipolar equipoise. The confrontation is, however, global, with universalization of the military arena. The accelerating rate of interaction in both governmental and non-governmental activities generates crises of increasing intensity, not merely in power, but in all value processes.

Base Values

The capabilities for effective power (potential values) in resources, people, and value-institutions are still predominantly under the control of particular nation-states and are very unevenly distributed about the world. The vast differences in the domain, range, and scope of control over potential values by the superpowers as contrasted with the mini-states are evident. The perspectives (loyalties, demands, and expectations) that are components of effective power are highly volatile and subject to manipulation. Skills in violence, propaganda, agitation, and group organization have long been important in effective power; modern science and technology are enhancing the relevance of more general enlightenment and skills. International governmental organizations have begun to break the monopoly of the nation-state over authority as a base of power; private associations, such as the great multinational business enterprises, have begun to break comparable monopolies over other values.

Strategies

All participants in effective power employ all the different instruments of policy—diplomatic, ideological, economic, and military—in an unceasing process to secure power outcomes. Major attacks upon, or interference in the internal affairs of other territorial communities, is not confined to the military instrument or even to governmental action. Coercion is applied by the diplomatic, ideological, and economic instruments, and private armies abound. The development and proliferation of nuclear, as well as of chemical and biological, weapons may change all previous patternings in confrontation, encirclement, and penetration.

Outcomes

In comprehensive sum, the most relevant outcome is an immense flow of decisions, some taken arbitrarily by naked power and others taken in conformity with community expectations about authority, which not only determines the fundamental power configurations of the global community but which also controls or affects fulfillments and deprivations with respect to all other values. A realistic and detailed summation could make reference to a pervasive insecurity of all individuals everywhere in terms of position, potential, and expectancy with regard to all values.

A policy-oriented framework of inquiry will, finally, investigate and stress the importance of the comprehensive process of authoritative decision that is a component part of the global process of effective power. It must of course be recognized that many features of transnational processes of authoritative decision are of relatively recent origin. For millenia humankind lived in isolated groupings with little physical contact, much less cooperative interaction. As populations increased and interactions became more frequent, the civilizations of China, India, Greece, and Rome all recognized expectations of authority and control that transcended different territorial communities and employed these expectations as important instrumentalities for the clarification and maintenance of common interest. The Greek concep-

tion of a natural law based upon a common human nature and shared by all humankind, which was developed by the Romans into a *ius naturale* and a *ius gentium* applied to many different peoples, has for centuries inspired international lawyers. The papacy long administered a higher law of God and natural law to many different peoples. When feudalism and Christian unity in Western Europe began to break up and the modern nation-state to emerge, the great founding fathers of contemporary international law—Vitoria, Suzrez, Grotius, Christian Wolff, Vattel, and so on—were able, by drawing upon both natural law and the practice of states, to construct a "law of nations" appropriate to a relatively decentralized, unorganized community, which could operate by promise of reciprocity and threat of retaliation. The development of more permanent structures of authority has come slowly through the experience of the Concert of Europe, the League of Nations, regional organizations, and, finally, the United Nations and its associated structures. The end result is, however, the establishment of a comprehensive global process of authoritative decision, including both constitutive and public order decision, entirely comparable to that today maintained in even the more mature national communities. It remains to examine these developments in some detail.

IV. The Main Features of Contemporary Global Constitutive Process and Public Order

It is not easy to shape the future if we do not know whence we have come and where we are. In our exploration above of the global community and effective power processes we noted the relatively recent emergence of a comprehensive transnational process of authoritative decision. Though this process of authoritative decision has not yet achieved that high stability in expectations about authority and in degree of effective control over constituent members that characterizes most mature national communities, it still proffers in somewhat more than rudimentary form all the basic features essential to the making and application of law on a global scale. In recent decades this process of authoritative decision, stimulated by the wielders of effective power, has been expanding and improving itself at an accelerating rate and, whether our concern is for major structural alterations or for lesser, more opportunistic reforms, this is the process

with which we must begin if we are to make any rational connection between where we are now and where we wish ultimately to go. It is important, therefore, that we examine in some detail the basic features both of contemporary global constitutive process, the process which establishes and maintains authoritative decision, and of global public order, the flow of decisions taken by constitutive process in the control and regulation of all other community value processes. We begin with constitutive process and employ the same categorizations recommended for the description of the community and effective power processes.[46]

A. Contemporary Global Constitutive Process

1. Participation

In recent times, largely within this century, there has been a very considerable, though not as yet complete, democratization of participation in global constitutive process. The nation-state, through its officials, remains of course the overwhelmingly predominant decision-maker. There has, however, with the disintegration of former empires, been a tremendous multiplication in the number of states, with a rapid disappearance of dependent entities. Unfortunately, because of the formal myth of "equality" of states—according all states, *inter alia,* equal votes whatever their populations and bases of power—this multiplication of new entities has not always had beneficent results for either democracy or responsibility.

Beyond the multiplication of state entities, there has been a vast proliferation of non-state entities performing important decision functions in constitutive process. A host of international governmental organizations, with the United Nations as a general-purpose core supplemented by many specialized and regional auxiliary institutions, both offers unique, distinguishable participants in decision-making and affords indispensable structures of authority for the interaction of other participants. Political par-

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[46] In this summary I draw heavily upon HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 4; McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision,* 19 J. LEGAL ED. 253 (1967), *reprinted in* 1 R. FALK & C. BLACK (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (1969).

For a brief history of theory about constitutive process, see Lasswell & McDougal, *Trends in Theories about Law: Comprehensiveness in Conceptions of Constitutive Process,* 41 GEO. WASH. L. REV. 1 (1972).

ties and orders, strengthened by modern techniques of mass communication and transportation, through their organization and management of particular nation-states directly affect the performance of many functions in authoritative decisions. Pressure groups dedicated to particular power objectives, in multiplying number, both achieve official affiliation with authoritative structures and affect important decision functions, such as intelligence, promoting, invoking, and appraising. Private associations, primarily dedicated to values other than power, are increasingly transnational in membership, goals, areas of activity, resources, and strategies and affect many important functions in the making and application of law. The great multinational business enterprises, primarily seeking wealth, and church organizations, primarily concerned with rectitude, offer examples. The individual human being is of course the ultimate actor in all these groupings, and the individual may act not only in the name of some grouping, but as an individual qua individual, to affect important decision functions. It is merely the blind or naive who can today describe nation-states as the only appropriate "subjects" of international law.

2. Perspectives

The perspectives incorporated into authoritative prescription in global constitutive process would appear to exhibit, in formulation if not in consistent application, both an increasing stability in perception of common interest and a turgid, but perceptible, movement toward the demands, identifications, and expectations appropriate to a public order of human dignity. Contemporary prescriptions increasingly reflect a shared perception of the inescapable interrelations of minimum order, in the sense of the minimization of unauthorized coercion, and of optimum order, in the sense of maximizing the production and distribution of all values.

The prescriptions directed toward minimum order center upon the United Nations Charter and attendant customary expectations which distinguish between permissible and impermissible coercion.[47] From the "*bellum iustum*" of early writers and

[47] For detail, see M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961).

through the Hague Conferences, the League of Nations, the Kellogg-Briand Pact, and the Nuremberg Verdict to Article 2(4) and various ancillary provisions of the United Nations Charter, there had developed for the first time in authoritative general community prescription a viable prohibition of unauthorized coercion across state lines. As specified in Article 2(4), states are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the [organization]."[48] It does not weaken this commitment that in Article 51, and attendant customary expectations, an inherent right of self-defense is also acknowledged. The right of self-defense has been found indispensable in even the most mature national communities, and in the decentralized, relatively unorganized global community it is especially important, when subjected to appropriate review, as a sanctioning measure for minimum order. All that is required for avoiding confusion are appropriate intellectual and practical procedures for examining and appraising particular contexts of coercion.

The prescriptions directed toward optimum order center upon that great bulk of recently emerged prescriptions about human rights. It has already been suggested that these prescriptions have begun to take on both the form and substance of the basic bills of rights long established and maintained within the constitutive processes of many national communities.[49] The high intensities with which the peoples of the world are in fact demanding the new human rights policies are manifest both in the vast flow of authoritative prescription and in an even vaster outpouring of non-official expression. These policies have been made into law by the United Nations Charter and the many general and specialized covenants, as well as by the customary expectations, confirmed by many international and national decisions, which have come to attend both these multilateral agreements and the Universal Declaration of Human Rights, once thought to be mere aspiration. Certainly these policies can, further, be unmade as law only by the same complex modalities, deliberate agreement

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[48] U.N. CHARTER art. 2, para. 4.

[49] This thesis is documented at length in HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 4.

and non-deliberate customary behavior, by which they have been made into law. These new human rights policies have also, as in national bills of rights, been made applicable to all actors in the larger global social process, including international governmental entities and officials, nation-states and their officials, and all non-governmental groups and individuals. Increasing efforts are being made, in final parallel, to afford individual human beings effective opportunity to challenge arbitrary deprivations of rights in appropriate structures of authority. This new global bill of rights covers in substance, it may be added, the whole spectrum of values contemporarily cherished by humankind, beginning with collective political emancipation and moving to individual enjoyment of greater participation in the shaping and sharing of all values.

The basic policies of the larger community about the management and enjoyment of great sharable resources, such as the oceans, air space over the oceans, international rivers, the polar regions, and outer space, inspired and informed by the expanding identifications of many decision-makers and by an increasingly common map of reality, continue to seek a balancing of inclusive and exclusive interests that will promote a net, aggregate common interest. In recognition of the ecological unity of the entire earth-space environment, an overriding goal is increasingly formulated, not so much in terms of a simple conservation of resources in a pristine state of nature as in promotion of an economic and constructive, appropriately conserving, employment in the greater production and wider distribution of all cherished values.

3. Arenas

In a state-centered world, the comprehensive global arena is still characterized by the absence of adequate centralized institutions designed to serve the different decision functions. Yet the structures of authority and other situations in which the decision-makers of global constitutive process interact have begun to exhibit both a considerable expansion and some modest movement toward an organized, permanent, inclusive form. It has been a principal contribution of the United Nations, and of the many specialized agencies and regional organizations, to supply these new structures of authority as a sort of improved backbone or

skeleton for global constitutive process. The traditional structure for interaction in international law has of course been the diplomatic arena, with its state official to state official communication, but the new international governmental structures of authority have tremendously enhanced opportunity for even this elite interaction. The holding of occasional, impermanent conferences for particular problems, which might be described as the establishment of parliamentary-diplomatic arenas, has also greatly increased in frequency, with a great array of conferences being in continuous session about the globe, with some, such as the Law of the Sea Conference, approaching permanency. The most dramatic recent change has of course been the development, as within the United Nations General Assembly and the corresponding structures in various specialized and regional organizations, of bodies that approach the form, and engage in the functional activities, characteristic of genuine legislative or parliamentary bodies in national constitutive processes. The established adjudicative arenas, characterized by third-party decision and distinctive procedures and criteria of decision, include not only various transnational judicial bodies and ad hoc arbitral tribunals, but also the courts of the different nation-states. Executive arenas, still quite weak and inadequate, include the secretariats of international governmental organizations, occasional specialized bodies such as the United Nations Security Council, and the executive arenas of nation-states. In addition to these formal, governmental structures, there are the multiplying situations, constituted by the patterns of interaction in the burgeoning private non-governmental associations primarily dedicated to values other than power, in which many important decision functions are performed.

Similarly, though some authoritative arenas remain closed to some participants in the process of effective power, there would appear to be a slow movement toward increased openness in access. Thus, though individuals and private associations are denied direct access to the International Court of Justice and to some arbitral proceedings, they have always had such access to national courts and their own foreign offices or state departments, and in recent years there has been an increasing establishment of specialized bodies, such as with respect to human rights and wealth transactions, to which even non-governmental claimants are accorded direct access.

Because of accelerating interdependences among participants in effective power, there has been also a slow parallel movement toward establishing compulsory jurisdiction over states and other actors who in fact affect community policy in particular interactions. Though the jurisdiction of the International Court of Justice is still based largely upon consent, agreements for compulsory arbitration or conciliation abound, and there appears a grudging willingness to submit to compulsory specialized procedures on specialized problems recognized as urgent, such as in the application of the Vienna Convention of 1969 on the Law of Treaties and in the proposed conventions emerging from the Law of the Sea Conference. Non-governmental participants have of course always been subjected to compulsory jurisdiction in national courts, and a rapid attenuation of historic doctrines of governmental immunity would appear to be making even nation-states more and more subject to the rule of law within such bodies.

4. Base Values

The base values that sustain authoritative decision in the global community, as in national communities, include both authority, that is, community expectations about decision, and capabilities in fact, that is, control over resources, people, and value-institutions. Though many of the more important bases for influencing decision remain under relatively exclusive control of nation-states, there appears to be a modest trend toward allocating to representatives of the inclusive community the authority and other assets required for the better securing of both minimum and optimum order.

The most encouraging development with respect to authority has been in the continuing expansion of the concept of "international concern" (the inclusive competence of the general community) with an appropriate attenuation in the concept of "domestic jurisdiction" (the exclusive competence of states). This distinction, reflecting the necessity of a continuing allocation and balancing of competence between center and peripheries, is inherent in the very conception of international law, even of a world rationally organized on a regional geographic basis, and is now authoritatively made in terms of the development of "international relations" or interdependences, that is, in terms of

the relative impact of activities on inclusive and exclusive interests. Thus, the competence of the general community is slowly being extended, through all necessary decision functions, to all matters of genuine transnational impact.

The traditional principles of state jurisdiction, which allocate among states the competences accorded under the rubric of "domestic jurisdiction," are also coming to be framed and interpreted in terms of the relative impact of activities on different exclusive interests. A principle of territoriality, reflecting the interests of a state in its own internal social process, authorizes states to prescribe and apply law to all events occurring within their boundaries, irrespective of the involvement of nationals or non-nationals. A nationality principle, recognizing the importance of individuals in community process, authorizes states to make and apply law to their own nationals, wherever they may interact or be. A protective principle (sometimes labelled that of "impact territoriality") authorizes states to take measures against deliberate attacks or other impacts upon their security and other values. A passive personality principle, in complement to the nationality principle, authorizes states to make and apply law to those who injure their nationals, wherever the events may occur. A principle of universality, appraising certain events (such as those involved in war crimes, piracy, slave trading, and genocide) as threatening the common interests of all humanity, authorizes any state securing effective control over the actors to apply certain inclusive prescriptions. In a global social process in which people and goods are in constant movement, states with effective control over persons and resources often forego their own authority, under doctrines of "act of state" or governmental immunity, to defer to the authority of other states that have made prior legislative, executive, or judicial decrees. Taken in sum, these more general principles of jurisdiction and a host of auxiliary principles, when appropriately applied in careful contextual examination of the differing features of interaction, serve importantly to protect and regulate an expanding transnational social process.

It is in the allocation of capabilities in fact, effective controls over peoples and resources, that contemporary constitutive process is most handicapped. The particular states, with large historic controls over peoples and resources, are highly reluctant, in

the absence of guarantees of security, to yield any important controls to the organized agencies of the general community. As among the states themselves, the differences in effective controls over peoples and resources are such as to make difficult any organized cooperation which reflects a genuine sharing of both power and responsibility. In such a context international governmental organizations perforce remain in some measure stillborn or impotent, in enforced reliance upon the annual contributions of states for survival, as well as for operation. It may be noted, however, that an allocation of controls over resources designed to secure an appropriate balance between inclusive and exclusive decision-making need not necessarily require complete centralization; a pluralistic or regional distribution of resources and values could better maintain an appropriate balance. In an earlier, and perhaps too optimistic, statement we wrote:

> The worldwide spread of enlightenment and skills, facilitating perception of interdependences and common interests, and modern institutions of instantaneous communication have, of course, concentrated immense assets in the hands of inclusive decision-makers. The expanding identities and loyalties of peoples, as transnational interactions accelerate, and the increasing internationalization of standards of rectitude and of respect for human rights add to these assets. More tangible assets may, perhaps, yet be found in the great sharable resources—such as the oceans, the airspace over the oceans, the polar areas, and outer space—which, despite recent inroads on behalf of special interests, are still largely under inclusive competence and control.[50]

5. Strategies

The strategies employed in constitutive process by authoritative decision-makers in performance of different decision functions include both all those more formalized procedures specialized to different functions and different structures of authority and all the basic instruments of policy—diplomatic, ideological, economic, and military—employed in the more comprehensive social and effective power processes. The more formalized proce-

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[50] *Legal Bases for Securing the Integrity of the Earth-Space Environment*, 184 ANNALS N.Y. ACAD. SCIENCES: ENVIRONMENT AND SOCIETY IN TRANSITION 375, 383 (1972).

dures are in constant process of revision by decision-makers in the structures of authority within which they are specialized to different decision functions, and in sum constitute a vast store of professional knowledge for lawyers who seek to inform and affect decision. Influenced by expanding scientific knowledge and skills in observation, improvements in the modalities of communication and cumulative experience in large scale administration, all these procedures would appear to be undergoing a slow rationalization in terms of economy and effectiveness. The exploration of potential facts in controversy, and of potentially relevant community policies, is being made more contextual and, hence, both more dependable and creative. The final selection and characterization of both facts and policies is being made more deliberate and, hence, more rational in relation to common interest. Measures in enforcement of authoritative decision are being built both more comprehensively and more selectively upon different features of social and power processes and, hence, achieving greater effectiveness in controlling practice. Developments such as these are of course most economically studied in relation to different decision functions, and it is convenient in a quick overview to concentrate only on the basic instruments of policy.

a. The Diplomatic Instrument

The most important decisions taken in international law remain in the countless and continuing communications from state official to state official. The availability of more continuous, permanent, and inclusive fora for communication, as in the structures of the United Nations, and its auxiliary agencies, has, however, brought new dimensions to the traditional interactions of state officials, affording new opportunities to air grievances, to express aspirations, and to engage in reciprocal intelligence and influence. The older diplomacy of occasional and elitist communication is being transformed into a more continuous, and democratic, parliamentary representation and activity. In addition, important new multilateral conventions have been projected, and accepted, for rationalizing the facilities and immunities of diplomats and for clarifying a more viable law of international agreements. Insofar as executive and judicial arenas rely upon the diplomatic instrument, new procedures are constantly being devised and tested.

b. The Ideological Instrument

The tremendous importance of the ideological instrument is in its potentialities for mobilizing world public opinion, not merely occasionally against particular instances of barbarism, but continuously in sustained support of all the decision functions indispensable to minimum and optimum order. The new techniques of instantaneous communication about the globe, to mass audiences as well as elite groups, promise both greatly to democratize participation in global constitutive process and profoundly to affect the effectiveness with which all decision functions are performed. Because of their limited access to resources, international governmental organizations have found the ideological instrument of especial importance. One dramatic example of this importance occurred when in the context of the Cuban Quarantine televised pictures of Soviet missiles in place in Cuba were introduced into the Security Council discussion, changing the whole tenor of the debate.

c. The Economic Instrument

The management of goods and services and the direct control of resources have long been used by state officials to affect transnational decision outcomes, in times both of peace and war. In contemporary times, the economic instrument appears equally at the disposal of the general community of states through a growing network of international governmental organizations, both general and particular. The recent positive employment of the instrument in what is known as "development programs" is in fact designed to promote within specified areas an increased production and distribution of all values. The success of the OPEC organization in managing the production and distribution of oil for political purposes offers a dramatic example of more comprehensive potentialities. The insistent demands of the developing countries within the United Nations structures for a "new international economic order" are well known to include demands also for a wholesale restructuring of global constitutive process.

d. The Military Instrument

The military instrument is as available, and perhaps as necessary, for the maintenance of public order between states as

within particular states. In an unorganized, decentralized world arena, it is indispensable that the general community should continue to honor, as the contemporary community does, appropriate measures in, and capabilities of, self-help, authoritatively labelled as "self-defense," "collective self-defense," "police action," "humanitarian intervention," "reprisals," and so on. The United Nations Charter would appear, for example, to have strengthened rather than weakened the lawfulness of occasional unilateral resort in appropriate context to the military instrument for the protection of human rights. With the failure of the original plan to establish within the United Nations a permanent military force for the maintenance of minimum order, the United Nations has had only minor successes in assembling and employing small forces in scattered parts of the world. The immediate prospects do not look bright for a more ambitious inclusive employment of the military instrument in support of general community policies. In an earlier statement we summarized:

> The promise of the integrated employment by the organized general community of all four instruments of policy, in the management of all relevant base values, for the improvement of sanctioning process in the establishment and maintenance of desired world public order remains, of course, largely for future exploration. In the meantime, the more important sanction for transnational law, as for most national law, resides in the perception by community members of their interdependences and common interests and in their expectations about reciprocal, unilateral indulgences and retaliations in relation to such interdependences and interests.[51]

6. Outcomes

The culminating outcomes of the comprehensive constitutive process are of course the authoritative decisions which in sum, and in varying degrees of conformity to projected policies, delimit the major features of world public order, including the continuing establishment and maintenance of constitutive process itself. In common parlance the different types of relevant decisions are traditionally described as legislative, judicial, executive, and administrative; these words, however, make more of a vague ref-

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[51] *Id.* at 384.

erence to varying structures of authority, in which different types of decisions are performed, than achieve a precise differentiation between different types of decisions. In an effort toward greater precision, proponents of policy-oriented inquiry recommend categorizations of different decision functions, or types of decisions, in terms of intelligence, promotion, prescribing, invoking, applying, terminating, and appraising. Each of these different categories of decision admits, in its turn, of minute description in terms of distinctive goals, decision-makers, structures of authority, base values, strategies, and outcomes. Each type of decision, though distinctive in goal, is of course closely interrelated with all other types, with the effective performance of any one being dependent upon all the others. With the gradual modification and improvement of all the different features of the larger constitutive process, described above, there has been a parallel, slow improvement in the more detailed features of the different particular functions, or types of decision. It would appear that most of these functions are being made more inclusive, in the sense of comprehending all participants who in fact affect or are affected by community process; more rational, in the sense of conformity of particular outcome to established community policy; more economic, in the sense of expenditure of community resources; and more integrative, in the sense of molding potentially divisive claims into the perception and fact of common interest. We briefly note developments, seriatim, with regard to each particular type of decision.

a. Intelligence

The intelligence function—with its distinctive goal of gathering, processing, and disseminating the information necessary to rational decision—is open to all participants in global social process. Traditionally, the gathering and processing of transnational intelligence is one of the oldest activities of state officials, and such activities—both legal and illegal—continue on a vast scale. More recently, intelligence has become one of the principal chartered functions of international governmental organizations, and the United Nations and other organizations are engaged in tremendous efforts in relation to a great variety of problems. The enhanced participation in transnational activities of political parties, pressure groups, private associations, and individual human

beings has also immensely enhanced facilities for gathering and disseminating the information relevant to rational decision. The newer technology for observation and communication made possible by outer-space instrumentalities, and other developments, still further augments potentialities. The massive and complex intelligence required for coping with all the immense problems presently confronting humankind, such as with respect to environmental protection and human rights, will not, however, be easily acquired and maintained. In mounting insecurity, the nation-state remains characteristically unwilling to submit itself to external scrutiny and to engage in the necessary cooperative intelligence activities. It is, further, as many observers have noted, not so much new intelligence in the gathering of information that the world situation requires, as new intelligence in the processing and dissemination of available information in comprehensive, centralized planning for major goals.[52]

b. Promotion

The promoting function, which adds the intensity of demand to expectation in the advocacy of policy alternatives, benefits equally with the intelligence function from the new democratization of participation in global processes of effective power. On the transnational level, as contrasted with the national, state officials, often representing large groups of states, are among the most active proponents of change. One primary purpose for which political parties are organized, transnationally as well as nationally, is the promotion of explicit programs. Pressure groups, by definition directed toward particular power and policy purposes, are increasingly active in the open structures of global constitutive process. Private associations, primarily specialized to values other than power, commonly seek power effects of transnational geographic reach in relation to the particular value to which they are specialized. The promise as well as the threat of the promotion function resides in the ease with which all these participants can, in the context of the contemporary communications revolution and the openness of the new structures of authority, formulate and propagate demands and organize public or bloc opinion

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[52] *See* McDOUGAL, LASSWELL & REISMAN, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973).

in favor of new authoritative prescription.

c. *Prescription*

The projection of authoritative prescription—with its communication both of a policy content and of expectations of authority and control—goes forward in the global community, as in its lesser component communities, by a great variety of modalities, from the most deliberate, organized, and specialized to the least deliberate, unorganized and non-specialized. The most deliberate modality of prescriptions, in which states cooperate with one another in explicitly formulating and undertaking policy commitments is of course the international agreement in its many protean manifestations. It is sometimes rather futilely debated whether agreements are law or a source of law, what agreements are "law making" and what are not, and in what degree agreements can make law for non-parties; yet, despite all these quibbles over technicalities, the agreement process has for many centuries been made to serve humankind well in the formulation and projection of general community policies, in what is not uncommonly called "international legislation," about most important transnational problems. The least deliberate modality of prescription may be observed in the lineaments of "customary law," probably the most pervasive and important law in any community, in which expectations about policies, authority, and control are generated by uniformities in cooperative behavior, both official and nonofficial. In theory, international law is created only when there is a "material element," the flow of uniformities in behavior or decision, accompanied by a "psychological element" or *opinio juris,* certain subjectivities of "oughtness" or "lawfulness," through a substantial period of time. In the facts of actual practice, the flow of behavior or decision need not be entirely uniform, the subjectivities of lawfulness are commonly derived from the behavior and other features of the context, and the time period required can be very short when general expectations about policy, authority and control are clear.[53]

The most striking recent development in the prescribing function builds upon the new role in global constitutive process

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[53] *See* Raman, *Toward a General Theory of International Customary Law,* in W. REISMAN & B. WESTON, TOWARD WORLD ORDER AND HUMAN DIGNITY 365 (1976).

of international governmental organizations. Contemporary practices in the United Nations and auxiliary bodies have both given a tremendous boost to the more traditional modes of lawmaking and added a new dimension that reflects a much closer approximation to genuine parliamentary enactment. The combined roles of the International Law Commission and of the General Assembly, through various committees, have greatly enhanced and rationalized lawmaking by multilateral agreement, as illustrated in many important new conventions, such as those about outer space, human rights, and the law of agreement-making itself. More importantly, the new opportunities afforded by the General Assembly of the United Nations, and by other more specialized bodies, to the representatives of the different particular communities of the world to announce their conceptions of prevailing international law and to present these conceptions in formal resolutions for acceptance or rejection by other representatives, have greatly eased the historic burden of identifying and clarifying the content of customary law. Certainly the modality of the General Assembly resolution greatly foreshortens the time necessary for establishing customary law and increasingly affords the representatives of states, whatever may have been the past uniformities in practice or decision about a particular problem, an economic mode for formulating and expressing their consensus in a form that is beginning more and more to resemble national legislation. Whether any particular resolution of the General Assembly constitutes or makes law must of course depend upon many variables, including the history and deliberateness of consideration, the degree of state support and of participation by nongovernmental groups and individuals, relation to past policies and more fundamental community policies, the sanctioning measures contemplated and established, and so on. Clearly, however, if inherited prescriptions about the major problems of the larger community are inadequate, the prescribing process offers few impediments to their being made more adequate.[54]

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[54] For the classic study of the role of United Nations agencies in making law, see R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963). A comprehensive review of modalities is offered in E. MCWHINNEY, THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS (1979).

d. Invocation

The opportunity for injured parties to invoke community prescriptions in challenge of alleged violations is of course indispensable to effective rule by law. Historically, the modalities of invocation in transnational arenas have long been characterized by state to state complaint, with individuals and private associations being made dependent upon the states of their nationality for surrogates or champions. All participants in global social process have, however, long had access to national arenas for the invocation of transnational prescriptions, and, as has been observed above, there is an accelerating trend toward the creation of more transnational arenas to which individuals and private associations are accorded access. Though the potentialities for invocation do not yet approach preferred policies, the opportunities for community members who would complain about the violation of prescription are increasing.

e. Application

The task of putting transnational prescriptions into controlling practice, by their application in particular instances of difficulty or controversy, has historically gone forward in claims and counter-claims from foreign office to foreign office and within national structures of authority, such as courts. It has already been observed that, in ancient insight, the fact that in this process the same state officials have to serve alternately as both claimant and judge affords at least some stimulus to clarifications and applications in terms of common interest. Most comprehensively considered, application includes a whole sequence of steps: the exploration of potential facts and policies; the characterization of certain facts and policies as relevant; the relation of the relevant policies to the relevant facts; the projection of a future relation between the parties; and the selection of appropriate sanctioning or enforcement measures. The slow approximation toward performance of the application function in these comprehensive terms through "negotiations," "good offices," "mediation," "commissions of inquiry," "conciliation," and "arbitration" to "adjudication" is a matter of common knowledge. We have already noted the increasing creation of new institutions for disinterested third-party application, characterized by both openness in access and compulsory obligation to respond.

The increasingly important role of the United Nations Security Council in highly contentious matters is of common knowledge. Fortunately, also, it appears possible to achieve a new comprehensiveness and rationalization of inherited principles of application for exploring and characterizing potential facts and potential policies.

f. Termination

In a global arena with a still imperfect prescribing function and characterized by periodic outbreaks of naked power it is important to have specialized criteria and procedures for putting an end to prescriptions and other arrangements when they cease to reflect appropriate public order goals. Most comprehensively conceived, termination includes exploration of the facts about the alleged obsolescence of questioned arrangements, the clarification of relevant community policies about termination, the cancellation or reaffirmation of the prior arrangements, and the minimization of the losses entailed in cancellation or reaffirmation. Historically, termination has of course often been effected by the same prescriptive processes that brought the older arrangements into existence. Yet additional criteria and procedures have been found in a complex of prescriptions about the termination of agreements, in specified requirements for customary change (desuetudo), and in the provision of specialized collective procedures for mobilizing public opinion and guiding change. The same development of new specialized procedures within the United Nations structures that has brought a new effectiveness and flexibility to the performance of the prescribing function has resulted in comparable improvement in putting an end to outmoded prescriptions and arrangements, permitting in particular the more rational amelioration of losses and costs.

g. Appraisal

Appraisal is a very sensitive aspect of the intelligence function which focuses explicitly upon the decision process in evaluation of how effectively and how economically it is achieving established goals. The sequence of activities in appraisal includes the gathering of the requisite information about the decision process, the processing of the information in evaluation and recommendation of appropriate change, and the dissemination of the findings

and recommendations to relevant audiences. In this function, participation is most democratic and is continuous, however badly exercised. Authoritative decision-makers, within both international and national structures, are constantly engaged in the observation and evaluation of themselves and others. More importantly, all other participants in effective power—political parties, pressure groups, private associations, and even individuals—are equally constantly involved in appraisal, both in general and in relation to particular features of decision. It is of course this function which affords academic critics the opportunity to sit in judgment upon officials and others.

B. Contemporary Global Public Order

The public order established and maintained by global constitutive process could be described in terms of the protection afforded and regulation achieved by authoritative decision with respect to every feature of global social process. The trend would appear, again, toward a slow improvement in an emerging global society, though a society not as well managed, or as secure, as the society achieved in more mature national communities. The most comprehensive description would make reference to the degree to which the different participants in global social process are protected in the establishment and maintenance of their own internal constitutive and public order processes and in their interactions with other participants; the extent to which appropriate situations of interaction in all the different value processes are maintained about the world; the modalities by which the different resources comprising the physical environment—land masses, rivers, oceans, air space, outer space, atmosphere, and so on—are allocated for inclusive and exclusive uses and how these uses are regulated and protected; the degree of success achieved in facilitating persuasive, and in restraining and minimizing coercive, employment of the various strategies (diplomatic, ideological, economic, and military) in the shaping and sharing of values;[55] and, finally and most importantly, the degree to which demanded outcomes in the different value processes (wealth, respect, enlightenment, and so on) are in fact achieved and pro-

[55] Illustrating this possibility is B. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION (1968).

tected. It is possible here only to make brief and suggestive indication of the kind of detail that would be relevant in such comprehensive inquiry.

The protection accorded the nation-state in global social process is, for quick illustration, the principal subject matter of traditional conceptions of international law.[56] It is the global constitutive process that identifies which territorial entities are to be regarded as "nation-states" and establishes their "legal personality" in processes of authoritative decision, specifies what purposes are permissible or impermissible to these entities in their interactions with other such entities and lesser participants, indicates the structures of authority (internal constitutive processes) required of a nation-state for effective participation in external affairs with other states, regulates the acquisition of, and sharing in the enjoyment of, bases of power (resources, people) by different nation-states, seeks to control the exercise by nation-states of the different instruments of policy in both persuasion and coercion, and, finally, allocates among the different nation-states the competences ("jurisdiction") to engage in the various authority functions (prescribing, applying, and so on) in the making and application of law to events in global social process. In a vast and continuing flow of decision, global constitutive process establishes for any particular territorial community a modest but viable security in relation to all these different features of interaction.

The obvious Achilles heel in global public order is in the failure of constitutive process to establish enough effective control over the different nation-states to preclude resort to unauthorized coercion and violence. The number one problem of humankind remains, as we have indicated above, that of security in the sense of establishing a minimum order, in control of unauthorized coercion and violence, which will permit more effective pursuit of an optimum order in maximization of the shaping and

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[56] The most commonly used casebooks in international law are devoted almost entirely to this subject matter. See, *e.g.*, W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS (3d ed. 1971); H. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES (2d ed. 1952); *cf.* W. HOLDER & G. BRENNAN, THE INTERNATIONAL LEGAL SYSTEM—CASES AND MATERIALS WITH EMPHASIS ON THE AUSTRALIAN PERSPECTIVE (1972).

For a broad review of contemporary practice, see De Arechaga, *International Law in the Past Third of a Century*, 1 RECUEIL DES COURS 9 (Hague Academy of International Law, 1978).

sharing of all values. Through articles 2(4) and 51 of the United Nations Charter, and many ancillary prescriptions, the global community has at long last achieved a workable distinction between impermissible and permissible coercion, admitting of application in particular instances in support of minimum order. It remains, however, for the community to establish an appropriate institutional framework both for disinterested, third-party appraisal of particular instances of alleged impermissible coercion and for the application of appropriate sanctioning measures in preventing and deterring coercion and in restoring and rehabilitating public order. Though contemporary nation-states receive tremendous benefits from constitutive process, they have as yet been only imperfectly subjected to its complementary burdens.[57]

Another participant in global processes receiving immense protection from constitutive process is the international governmental organization. These organizations not only play an important role in constitutive process, most especially in supplying structures of authority and in performance of particular functions, but have their every feature and activity determined by such process. Their legal personality and roles, their membership, their structures of authority, their bases of power and procedures, and the decisions they can make are all subjected to comprehensive and minute prescription. Because of the derivative bases of power of these organizations, constitutive process is, perhaps unfortunately, much more effective in restraining the impermissible activities than it is with respect to nation-states.[58]

Still another participant in global processes, for further illustration, that receives at least modest protection from, and considerable subjection to, constitutive process is the transnational business enterprise.[59] These enterprises are governed by a vast and complex flow of authoritative decisions that determine their

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[57] For detail, see 3 R. FALK & C. BLACK (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (1971); M. MCDOUGAL and F. FELICIANO, *supra* note 47, at ch. 3; E. MCWHINNEY, THE INTERNATIONAL LAW OF DETENTE (1978).

[58] D. BOWETT, THE LAW OF INTERNATIONAL ORGANIZATIONS (2d ed. 1970); CASES ON UNITED NATIONS LAW (2d ed. L. Sohn 1967); L. SOHN, CASES AND MATERIALS ON WORLD LAW (1950).

[59] For a balanced review, see L.N. Cutler, *Global Interdependence and the Multinational Firm*, in FOREIGN POLICY ASSOCIATION 239 HEADLINE SERIES 1 (1978).

The content of H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS (2d ed. 1976) largely relates to this protection.

establishment as independent entities (internal constitutive processes) and legal personality, their access to the different geographic areas of the world, any special advantages in authority (immunities and facilities) they may receive, the protection of their property and other resources, their labor relations, their making of agreements and subjection to delictual responsibility, their subjection to taxation and other national legislation (monetary, trade, anti-monopoly, and so on), and finally, their claims to enjoyment of the profits and other benefits of their enterprise. Indeed, including features of both public and private international law, constitutive process in relation to transnational business enterprises is so well developed as to exhibit various uniquely relevant prescriptions, such as those with respect to the competences of states to make and apply law, limitations upon the competences of states for the protection of aliens, limitations upon the relevance of state immunities and "acts of state," provision of special competences to states to protect their nationals, and so on.

In contemporary global constitutive process, even the individual human being is accorded some protection under an immense body of prescription, including both the recent human rights prescriptions and the older doctrines about the rights of aliens, and is afforded access to many structures of authority, national and international, for securing this protection.[60] For many centuries the individual human being has been made subject to duties under international law prescriptions with respect to war crimes, piracy, slave-trading, and so on. Certainly, it is no longer accurate to describe individuals as mere "objects," rather than "subjects," of international law.

The public order presently established for the protection of the environment leaves of course much to be desired.[61] Our inherited prescriptions about the allocation and exploitation of the

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[60] P. JESSUP, A MODERN LAW OF NATIONS (1948) stressed the increasing protection of the individual. This is what the human rights program is about. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28; Higgins, *Conceptual Thinking about the Individual in International Law*, 4 BRIT. J. INT'L STUD. 1 (1978); Len, *Demanding Human Rights: A Change in World Legal Order*, 6 HOFSTRA L. REV. 269 (1978).

[61] J. SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT (1979); McDougal & Schneider, *The Protection of the Environment and World Public Order: Some Recent Developments*, 45 MISS. L.J. 1085 (1974).

resources, which in sum comprise the environment, are not, however, as archaic, irrelevant and inadequate as sometimes suggested. The global constitutive process, in recognition of the exigences inherent in cooperative, interdependent exploitation, seeks through a variety of prescriptions and institutions to impose restraints upon the assertion of special interests, even in relation to the land masses, and to encourage the mutual recognition and reciprocal protection of common interests, especially in relation to sharable resources.[62] In one set of prescriptions, those relating to the allocation of resources, the community projects an economic, productive balancing between inclusive and exclusive uses and the establishing of the great sharable resources of the globe—that is, those admitting of a high degree of shared use by reasonable accommodation—such as the oceans, the airspace over the oceans, international rivers, the void of outer space, and the celestial bodies, as of relatively inclusive use and competence, not open to exclusive appropriation by particular states. The present ongoing, collective effort to write a new law of the sea, characterized by importunate claims to monopoly of a kind not heard for some two hundred years, raises some doubts about the continuation of this inherited policy, but it is not yet clear in what degree and for how long the claims to monopoly will succeed, or whether they will spread to other resources. In another set of prescriptions, in regulation of the injurious use of resources, the community seeks through explicit multilateral agreement and customary law to minimize and restore the losses caused both by major, deliberate attacks by states on each other's territorial integrity and by the less comprehensive, often unintended, deprivations that inevitably attend transnational interaction; in some situations these prescriptions build upon reasonableness and in others they impose absolute liability. Still other prescriptions, such as the historic international law of the sea, are designed to protect and facilitate the productive and harmonious inclusive enjoyment of sharable resources. For some centuries our inherited law of the sea, employing a few simple customary rules in a largely decentralized and unorganized arena, has served the func-

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[62] M. ARSANJANI, INTERNAL RESOURCES IN WORLD PUBLIC ORDER: EXCLUSIVE USES AND INCLUSIVE COMPETENCES (forthcoming, University of Virginia Press); O. SCHACHTER, SHARING THE WORLD'S RESOURCES (1977).

tion of clarifying and securing, by reciprocal indulgences and restraints, the common interests of all peoples in the greatest possible production and distribution of values from the oceans,[63] and in recent times a comparable regime is being extended by both agreement and customary development to the enjoyment of the resources of outer space.[64] The more active performance of appropriate planning, developmental, and enterprisory functions with respect to all resources comprising the environment is, further, being stimulated by an immense proliferation of international governmental organizations and private associations, specialized and non-specialized, general and regional. Some amelioration of the obvious inadequacies in the relation of peoples to resources is, finally, beginning to be achieved in an accelerating movement toward a more rational regional organization of world society and in the contemporary human rights prescriptions that honor freedom of movement between communities and freedom to change community memberships, as well as a right of self-determination for certain communities.

Another relevant way of describing contemporary global public order would be in terms of the protection afforded, or not afforded, to the different features of each particular value process. Thus, the global wealth process, which brings affluence to some and poverty to many, could be described in terms of protected participation, perspectives, access to situations, base values, and strategies in the making of agreements and imposing of deprivations, and outcomes in the production and distribution of goods and services. Professionals in this area are aware of an immense body of prescriptions relating to the maintenance of a monetary unit, the stimulation and protection of transnational investment and development, the promotion and protection of transnational trade, the transfer of technology and skills, and so on.[65]

Similarly, when respect is conceived, not merely as mutual

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[63] M. McDougal & W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (1961).

[64] M. McDougal, H. Lasswell & I. Vlasic, Law and Public Order in Space (1963).

[65] *See* 2 R. Falk & C. Black (eds.), The Future of the International Legal Order, (1970); G. Schwarzenberger, Economic World Order? A Basic Problem of International Economic Law (1970); Anand, *Towards a New Economic Order,* 15 Int'l Stud. 467 (1976); *Symposium on the New International Economic Order,* 16 Va. J. Int'l L. 283 (1976).

deference, but as the reciprocal honoring of individual freedom of choice about participation in the different value processes,[66] the protected features of a global respect process could be described in comparable terms. While the various communities of humankind have seldom approximated the full achievement of respect in the sense specified above, the increasing rhetorical acceptance in modern times of human dignity as the overriding goal for all communities is significant. The overriding importance of freedom of choice in the shaping and sharing of all values is beginning to be articulated and established as authoritative general community expectation in a wide range of formal expressions at both the transnational and the national levels. Community prescriptions clearly prohibit the most glaring forms of deprivation of freedom of choice, such as slavery and slave-like practices, caste, and apartheid.[67] In addition a general norm of non-discrimination is rapidly emerging as an accepted prescription of international law. This authoritative norm of non-discrimination is comprehensive in reference both to protected rights and to impermissible group characterizations. It forbids, in general, all differentiations made on grounds irrelevant to individual capabilities and contributions, such as race, sex, religion, political opinion, language, and nationality.[68]

In the global well-being process, while human miseries such as disease, hunger, violent death, high mortality rate, low life expectancy, mental disturbances, slums, genocide, and ecocide continue to exist in many parts of the world, the importance of maintaining optimum standards of health, safety, and comfort has gained wide and authoritative recognition. To fulfill the projected goal of affording the individual "the right to a standard of living adequate for the health and well-being of himself and of his family,"[69] and "the enjoyment of the highest attainable standard

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[66] HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, describes in detail the protection accorded this value. Chapter 3 offers outlines for describing the protection accorded to all the eight values we employ in inquiry about social process. *Cf.* C. JENKS, LAW, FREEDOM AND WELFARE (1963).

[67] *See* C. JENKS, *supra* note 66, at 468-560.

[68] *See id.* at 561-796.

[69] *Universal Declaration of Human Rights,* art. 25, *reprinted in* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 2, U.N. Doc. ST/HR/1 (1973) [hereinafter cited as U.N. HUMAN RIGHTS INSTRUMENTS].

of physical and mental health,"[70] community efforts, both transnational and national, have been directed to the provision of medical care, prevention of disease, healthful housing, appropriate food and clothing, sanitation, healthy working conditions, appropriate leisure and recreation, and necessary social services. Guided by a broad perspective about the values of well-being, community efforts are directed to the attainment of "environmental and industrial hygiene,"[71] to a wide range of measures aiming at the objectives of prevention, deterrence, restoration, rehabilitation, reconstruction and correction, and, ultimately, to the task of minimizing unauthorized coercion and violence (global, regional, national, or local).[72]

In the global process of enlightenment, although barriers to the gathering, processing and dissemination of information and knowledge continue to exist in many parts of the world, transnational prescriptions have been formulated to protect the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,"[73] through all media. Toward this goal, positive facilities, governmental and private, are increasingly provided to promote inquiry, communication, education, and training. Education at all levels is increasingly made available, and equally accessible, to all, under the constraints of varying conditions in particular communities, with a shared goal of fostering "the full development of the human personality," fortifying "respect for human rights and freedoms," promoting "maintenance of peace," and enabling "all persons to participate effectively in a free society."[74] Transnational cooperation to promote the sharing of information, scientific knowledge, and cultural exchange across state boundaries, though not without difficulty, has tremendously expanded.

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[70] *International Covenant on Economic, Social and Cultural Rights,* art. 12(1), *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 5.

[71] *Id.* art. 12(2)(b), U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 5.

[72] *See* Caldwell, *Well-Being: Its Place Among Human Rights,* in TOWARD WORLD ORDER AND HUMAN DIGNITY 169-97 (W. Reisman & B. Weston eds. 1976).

[73] *International Covenant on Civil and Political Rights,* art. 19(2) *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 11. *See also Universal Declaration of Human Rights,* art. 19, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 2.

[74] *International Covenant on Economic, Social and Cultural Rights,* art. 13(1), *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 5.

In a world of universalizing science and technology, the skill process takes on added dimensions. New technologies and skills developed in one community have application far beyond its borders and travel with an accelerating tempo about the globe. Despite the existence of recognized centers of creativity, no single state has a monopoly of innovation in technology and skill. Thus, transnational prescriptions governing programs for transfer of technology and skill, for technical exchange or assistance, proliferate. Notable advances have been made in the formulation and application of transnational prescriptions governing the acquisition and exercise of skills through attainment of freedom from forced labor, freedom of association for trade union purposes, freedom for collective negotiation, freedom from discrimination concerning employment or occupation on such invidious grounds as race, sex, and religion, the right to work, articulation of fair labor standards, and provision for access to vocational training.[75]

In the global process of affection, although pursuit of congenial personal relationships continues to be frustrated or stifled in many parts of the world through such measures as prohibition of interracial or interreligious marriages, networks of secret police and informers, and excessive demands for absolute loyalty and submission to the state, considerable transnational protection is afforded the individual for the shaping and sharing of affection. The family, while in crisis at a time of rapid social change, is regarded as "the natural and fundamental group unit of society," and, hence, to be accorded "the widest possible protection and assistance."[76] Voluntarism is a manifest policy in community prescriptions regarding the formation, maintenance, and termination of marital relationships. No less manifest is the trend toward equality of the spouses in their rights and responsibilities concerning marriage, during marriage, and after its dissolution. The complementary policy of responsibility is given expression through special measures for the protection of children, especially

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[75] *See* INTERNATIONAL LABOUR OFFICE, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1976); C. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS (1960); C. JENKS, THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM (1957).

[76] *International Covenant on Economic, Social and Cultural Rights,* art. 10(1), *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 5. *See also International Covenant on Civil and Political Rights,* art. 23, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 11.

in cases of the dissolution of marriage. As transnational mobility grows, families are widely dispersed across boundary lines for purposes of work, travel or study, and a new network of friendship is, increasingly, established transnationally. While transnational prescriptions that facilitate the whole process of self-determination and decolonization have significantly contributed to group loyalties and solidarity in the name of the nation-state, the contemporary global movement for human rights has developed the potentialities for adapting local doctrinal systems and sentiments to more inclusive loyalties and identification with entire humanity.

In the global process of rectitude, while religious persecution and conflict are far from a thing of the past, the recent transnational effort regarding matters of fundamental belief of right and wrong has been largely confined to the task of giving more specific content to the comprehensive, general protection accorded freedom of belief. The comprehensive "freedom of thought, conscience and religion,"[77] as projected, includes "freedom to maintain or to change [one's] religion or belief, and freedom, either individually or in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching."[78] The world community has yet to reach a consensus as to a system of presumptively authoritative, detailed expectations that can be invoked or applied in the area of religious discrimination. The intensified demands manifested in the drafting of a declaration and a convention concerning religious intolerance and discrimination and in the global ecumenical movement have nonetheless exerted a profound impact upon the perceived policies in the realm of rectitude norms. It is more widely understood than ever before that religious freedom is not ultimately to be linked to faith in any particular version of divinity. The confrontations between proponents of a single God and proponents for a plurality of gods have brought home the good

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[77] *International Covenant on Civil and Political Rights*, art. 18(1), *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 10-11; *Universal Declaration of Human Rights*, art. 18, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 2.

[78] *International Covenant on Civil and Political Rights*, art. 18(1), *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 10-11. *See also Universal Declaration of Human Rights*, art. 18, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 69, at 2.

faith and the depth of commitment of all concerned. A parallel effect can be seen in a comparable confrontation among exponents of divinity and secular champions of an impersonal flow of determining forces in the universe. A further striking development relates to the increasing tolerance of the doubters or searchers who have chosen to withhold commitment to any theological or metaphysical body of doctrine and practice.[79] Other concerns of rectitude norms relate to varying conceptions of individual and collective responsibility in national and international systems of criminal law and to accommodations between diverse systems, by extradition, protection of political offenders, rights of asylum, formulation of minimum standards for the treatment of prisoners, and so on.

V. The Conditions Affecting World Public Order

If we are effectively to anticipate, much less to shape, the international law of the future, we need to know something of the conditions that have affected present achievement, and may continue to bear upon the future.[80] It is implicit in all that we have said above that international law, like other law, is affected by a vast complex of conditions. When law is conceived as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests, the most important conditioning variables are of course to be found within the subjectivities of community members. Social scientists have long effectively employed what is known as the maximization postulate, which asserts that people adopt one response rather than another when they expect to be better off in terms of all their values by adopting the response chosen. From the vantage point of this postulate, any choice by community members among alternative legal strategies, or among alternative features of potential processes of authoritative decision, can be expected to be a function of the totality of their predispositions: their demands for values, their identifications, and their expectations about the context of interaction. Predispositions are not, however, the sole determinants of outcomes in interaction; expecta-

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[79] *See* Human Rights and World Public Order, *supra* note 28, at 653-89.

[80] More detail about the themes in this section appears, with citations, in Human Rights and World Public Order, *supra* note 28, at chs. 1 & 5.

tions may be mistaken. The constraints that are in fact imposed by environmental variables—resources, people, value-institutional practices—are of equal relevance. Hence, whether one's concern is for the shaping of some relatively specific practice in international law with respect to some particular problem or for the larger outlines of future global public order, relevant inquiry must take into account a relatively large range of both predispositional and environmental variables.[81] It is convenient, as indicated, to categorize predispositional variables in term of demands, identifications, and expectations and environmental variables in terms of peoples, resources, and value-institutional practices. We take a brief look at both sets of variables and consider implications.

The most important variable in the contemporary global processes of effective power, if in a complex of indetermination any one variable can be said to be most important, would appear to be what is commonly referred to, as above, as "the rising common demands" of all peoples for the basic values of human dignity. While different peoples located in different parts of the world, and conditioned by varying cultural traditions and modes of social organization, may assert these demands in different modalities and nuances of institutional practice, the important fact is that the peoples of the world, whatever their inherited differences in culture and institutional practice are ever more insistently demanding the greater production and wider distribution of all these basic values and that the processes of authoritative decision in all their communities, including the global, be brought to bear to facilitate and protect such production and distribution. These universalizing demands for a wider participation in all the value processes making for a dignified human existence must affect all future decisions, effective and authoritative. Unhappily, in a world divided by contending ideologies and public order systems (especially in relation to wealth), and characterized by communities in different stages of development, some of the demands most intensely asserted are less than comprehensive in terms of the

[81] The complexity of these interrelations is well-indicated in Reisman, *Private Armies in a Global War System: Prologue to a Decision*, 14 VA. J. INT'L L. 1 (1973); Suzuki, *Extraconstitutional Change and World Public Order: A Prologue to Decision Making*, 15 HOUS. L. REV. 23 (1977). *See also Symposium, Conditions of World Order*, 95 DAEDALUS 455 (1966).

values sought and often exclusively parochial in geographic reach, emphasizing special rather than common interests.

The identifications in the name of which demands are asserted range today between embracing the whole of humankind to bestowing primary loyalties upon miniscule parochial groups.[82] The earliest syndromes of parochialism, reaching back to the family and the tribe, were first broken by the advent of cities, permitting identifications with the public order of civilized states. In most recent times the "nation-state" has been the principal symbol about which individuals could organize their collective identifications. In a context of deep insecurity, it can be expected that nation-states, old and new, will compete so intensely for the loyalties of individuals as to inhibit more inclusive identifications. It would appear, however, that the potentialities for forging and sustaining more inclusive identifications are strengthening. The accelerating tempo of global interaction, facilitated by modern methods of communications and transportation, allows a person not merely to change physical location, but affords opportunity to change one's "place" in the world through a continuing process of identifying with a multiplicity of human groupings. Individuals who seriously take one another into account in a vast network of territorial and functional activities are better able to identify with one another in terms of a common humanity and to act together more expeditiously in common cause.

The expectations of the people of the world about the conditions that affect the securing of their values, the expectations that in turn affect all decision, vary tremendously in their comprehensiveness and realism. These expectations require relation to all values and to every feature of each value process. The greatest contemporary failure in realism is in the lack of appreciation of the comprehensiveness and depth of the interdependences of all peoples everywhere with respect to the shaping and sharing of all values. With much more realism, in a world in which the giant powers continously balance weapons capable of instantaneous global destruction, most peoples, elite and rank and file alike, are obsessed by a pervasive expectation of violence that affects all

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[82] The relevance of all types of subjectivities is developed in Lasswell, *Future Systems of Identity in the World Community,* in 4 R. FALK, & C. BLACK (eds.), THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 1 (1972).

choices among alternatives in decision. Fortunately, the spread of modern education and new techniques of communication make it possible for individuals everywhere to acquire a new realism about the conditions, not merely of continued existence, but of improved public order. As the network or interaction and perception of interdependence expands, more and more peoples may come to perceive that all the major problems of transnational impact require the clarification and securing of common interest. Such shared perception of common interest is a first vital condition for rational collective decision.

The relevance of population characteristics among the environmental variables relates to numbers, rates of growth, and distribution in relation to resources.[83] The recent explosive growth in the population of the globe is one of the most salient trends in human history. Given the present rate of growth, the total population of the globe is expected to double again within thirty-five years. With few habitable open spaces remaining, and with states characteristically erecting national barriers to immigration, a maldistribution of peoples in relation to resources is likely to continue into the foreseeable future. The problems posed by this accelerating growth and maldistribution of peoples are not confined to Malthusian concern about food supply, but affect the entire quality of life, including the shaping and sharing of all important values. Fortunately, population problems, like most of the others confronting us, are human-made and subject to being brought under human control. Though many of the important choices affecting population growth are private choices within protected civic order, many of them can be affected by authoritative decision in the name of public order. Certainly the maldistribution of peoples in relation to resources can be corrected by authoritative decision that moves toward a more rational regional organization of the world.

The important resources that affect degrees of achievement in global public order appear to be both diminishing in quantity and deteriorating in quality. The contemporary energy crisis and the major problems it exacerbates emphasize the potential threats from impairment of resources upon the enjoyment and fulfillment of all values. An important reality of the earth, given

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[83] *See* W. HEHMAN, ET AL. (ed.) POLICY SCIENCES AND POPULATION (1975).

the levels of technology in immediate prospect, is the relatively finite quantity of the resources available to maintain human existence. Despite divergent forecasts, it would appear that many key resources may in the not too distant future become depleted or too expensive to exploit. Similarly, the mismanagement of resources has, as already noted, created an ecological crisis of global proportions that threatens the quality, if not the existence, of life. Though the nature, degree, and tempo of damage to the environment differ from region to region and community to community, the crisis is comprehensive in total impact. The deterioration of the environment is not, however, as yet irreversible, and the importance of any particular resource is a function of many factors, including the state of technology, available manpower and skills, and efficiency in social organization. The role of technology is especially crucial, and many constraints upon resources have been, and can still be, overcome by advancing technology. It is comtemporary technology that has built global and regional networks of communication, production and transportation and enabled people, ideas, and goods and services to move quickly and frequently across frontiers than ever before, establishing a more rational and economic relationship between manpower and resources. The prophets of doom could still be disappointed by future technological developments.

The inherited value institutions of contemporary global public order, established at various community levels (regional, national and local, as well as global), are of course among the most important variables affecting future public order. These institutions would appear, unfortunately, to lack an appropriate balance at the different community levels. It is no news that since the rise in the mid-seventeenth century of the modern state system, the world arena has been characterized by the predominance of territorially organized nation-states. The quantity and quality of transnational interaction has been largely shaped by the patterns of cooperation and coercion established, or tolerated, by the elites of states of varying composition capabilities, and ideological orientation. Despite the increasingly varied and important roles played by non-state organizations, especially by those primarily dedicated to values other than power, these organizations have had, often quite arbitrarily, to adjust their activities to the constraints of the territorial context. The power ascendancy of the nation-state has been so built into the perspectives of all actors

that a bias in favor of calculating advantages and disadvantages in terms of a particular nation-state dominates most activity and decision.[84] It may be recalled, however, that all the existing institutions, however state-centered and tradition-bound, were created by human beings, and can be changed to serve common interests when such interests are appropriately clarified and perceived.

It should require no new emphasis that all these variables are in constant interaction, each affecting the other, and all in sum establishing the global interdependences described above both within any single value process and as between all value processes. These variables acquire and assert their significance in the processes of interdetermination in which the global social process, the process of effective power, the global constitutions process of authoritative decision, and the protected features of public order all reciprocally condition each other. The outcomes in any particular value process are, in utmost realism, conditioned, not merely by all the other features of that process, but by the outcomes and distinctive features of all the other value processes. The lawyer or other proponent of change who would be effective—whether his concern is for immediate or long-term, or particular or aggregate, outcomes—must have a focus of attention and theory of inquiry, however difficult the task, that adequately takes into account all these different interrelationships.

VI. Possible Futures in World Public Order

If humankind is to survive in any condition other than that of sheer barbarism, there will of course continue to be an international law, or process of authoritative decision, in which the members of a transnational community seek to anticipate the costs and benefits of alternative decisions and to shape the features of a preferred world public order. A deliberately policy-oriented framework of inquiry will put more emphasis upon understanding, insight, and the possibilities of change than upon the potentialities of predictions in specific instances. Yet, even policy-oriented inquiry can observe that the projection of possible futures, when disciplined by knowledge of trends and conditions,

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[84] This is a repeated emphasis of Falk. *See* Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 Yale L.J. 969 (1975).

may serve to stimulate creativity in the invention and evaluation of alternatives in future decision.[85] It is common knowledge that in recent times many new schools of "futurologists" have emerged among intellectuals about the world who seek to improve, and have made many suggestions about the improvement of our intellectual tools for peering into the future.[86] Unfortunately, not many of these newly arrived prophets have yet focused upon the immense problems of global public order, and the few who have so addressed themselves have not always had, as suggested above, a realistic map of the interrelations of authority, effective control, and social process.

One procedure for inquiry about the future—made popular, if not invented, by my late colleague, Harold Lasswell, some fifty years ago—is that of deliberately formulating provisional maps or "developmental constructs" of future possibilities that range through a broad spectrum, from the most optimistic to the most pessimistic.[87] By provisionally adopting a spectator's stance, as free as possible from the distorting effects of goal commitment, an observer may be able, by perceiving future contingencies previously overlooked, to improve fundamental strategy. A realistic projection of probable future developments can seldom be made by a simple extrapolation of the past. The course of future development depends rather upon the total constellation of many conditioning factors that may, or may not, support the direction and intensity of trend. To arrive at a disciplined estimate of possible

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[85] More detail about the themes in this section appears, with citations, in HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at ch. 5.

For a much more comprehensive statement, see H. LASSWELL, THE WORLD REVOLUTION OF OUR TIME: A FRAMEWORK FOR BASIC POLICY RESEARCH, IN WORLD REVOLUTIONARY ELITES 29 (H. LASSWELL & D. LERNER eds. 1966).

[86] W. ASHER, FORECASTING: AN APPRAISAL FOR POLICY MAKERS AND PLANNERS (1948); D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (1973); W. BELL & J. MAU, THE SOCIOLOGY OF THE FUTURE: THEORY, CASES, AND ANNOTATED BIBLIOGRAPHY (1971); B. DE JOUVENEL, THE ART OF CONJECTURE (1967); S. ENCEL, *et al.*, THE ART OF ANTICIPATION: VALUES AND METHODS IN FORECASTING (1975); D. GABOR, INNOVATIONS: SCIENTIFIC, TECHNOLOGICAL AND SOCIAL (1970); D. GABOR, INVENTING THE FUTURE (1964); E. JANTSCH, TECHNOLOGICAL FORECASTING IN PERSPECTIVE (1966); H. KAHN & A. MILNER, THE YEAR 2000 (1967); J. MCHALE, THE FUTURE OF THE FUTURE (1971); F. POLLAK, THE IMAGE OF THE FUTURE (2 vol. 1960, 1961); THE FUTURE OF TIME: MAN'S TEMPORAL ENVIRONMENT (H. Yaker, H. Osmond & F. Cheek eds. 1971); Bell, *Twelve Modes of Predication—A Preliminary Sorting of Approaches in Social Science,* 93 DAEDALUS 845 (1964).

[87] The basic study is H. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1935).

futures, it is necessary to estimate the continuing presence or absence, strength or weakness, of the various conditioning factors. The policymakers of a community may be able by outlining favorable and unfavorable developmental constructs, on the basis of existing knowledge of past trends and conditions and of critical estimates of the interplay of such trends and conditions, both to sharpen the realism of their projections and to increase the inventiveness they bring to the choice of alternatives.

The principal question for an observer who cherishes the values of human dignity is whether future movement in global public order will be toward or away from the practices and institutions of human dignity. The two most comprehensive, dramatically opposed, constructs that might be developed present very different images of emerging global public order. The optimistic construct projects that progress toward achieving a wider sharing of power and a greater production and wider sharing of values in a public order of human dignity will continue. The pessimistic construct projects a sequence that moves with an increasing centralization, concentration, and militarization of power, towards a global public order of garrison prison states with a new order of castes.[88]

The long, historic trend away from impoverished caste societies will, the optimistic construct specifies, continue until a free and abundant peoples' commonwealth is achieved on a global scale.[89] A peoples' commonwealth is characterized in this conception by the shared participation of all individuals in both production and enjoyment in all value processes. This construct builds of course upon many assumptions about conditioning variables and their interaction, including contemporary notions of human nature and social process. It projects, thus, that the "rising common demands" of peoples for a greater and more rewarding participation in all value processes will not abate, but rather inten-

[88] An even more pessimistic construct appeared in the New York Times as these lectures were being delivered. Under the heading "Doomsday Debate: How Near the End?" consideration is given to the possible instant extinction of the human race by a number of possible natural catastrophes. Comfort is offered the reader by the suggestion: "Scientists have . . . redoubled their efforts to learn why the dinosaur suddenly died out 65 million years ago after having flourished for 140 million years." N.Y. Times, Nov. 14, 1978, § C (Science), at 1, col. 1.

[89] Some possibilities are considered in G. MISCHE & P. MISCHE, TOWARD A HUMANE WORLD ORDER (1977).

sify; that the contemporary parochial identifications of peoples, despite recurrent waves of fragmentation, will expand toward recognition of common humanity; that the peoples of the globe will achieve increasingly comprehensive and realistic perception of their indissoluble interdependences with respect to all values; that the wildly accelerating rate of population growth will be brought under control; that technology will create ample resources and that enough enlightenment will be achieved to permit maintenance of the environment as a livable habitat; that more economic governmental and functional institutions can be created and maintained; and so on. These are pretty strong assumptions, but they are not entirely without reinforcement from past trends and a growing enlightenment.

The trend toward the values of human dignity is at least as ancient as the beginnings of urban civilization, and recent centuries have, with the accelerated development of science and technology, brought an acceleration in the tempo of change. This acceleration in the tempo of change has increased the awareness among all peoples of interests that involve all members of the human race in a common destiny. There are few compelling grounds for believing that science and science-based technology will be abandoned, that interdependences will lessen, and that humankind will not be able to perceive its interdependences. Certainly there are no convincing grounds for forecasting that significant numbers of the world's intellectuals and professionals will cease to affirm and clarify the conception of human dignity, or to evaluate the functioning of public and private institutions according to their positive or negative impacts upon the realization of the values of human dignity.

The pessimistic construct, in contrast, regards the direction of history as revising itself, moving toward a world of militarized, garrisoned communities, controlled from the center and modelled on the prison.[90] The trend could be toward a comprehensive totalitarian state with a system of public order that, when finally entrenched, organizes the world community into a vast hierarchial pattern under the effective rule of a self-perpetuating military

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[90] Some of the dangers are recounted in the not entirely pessimistic projections of R. HEILBRONER, AN INQUIRY INTO THE HUMAN PROSPECT (1974).

For a collection of articles, with many references, see *Symposium, The Future World Order*, 31 J. INT'L AFF. 171 (1977).

caste. This construct builds upon very different assumptions from the optimistic, about possible developments among the conditioning variables of global social and effective power processes. It builds upon such unhappy possibilities as that the peoples of the world will not be able to clarify a long-term common interest, but will rather pursue short-term, special exclusive advantages; that the identifications of peoples will remain territorially bound and parochial rather than extending to a common humanity; that peoples' expectations will in general remain diffuse and unrealistic and that, in particular, the expectation of violence will be sustained at such a high level as to serve as a chronic justification for the continuous military mobilization of human resources; that efforts to control the accelerating role of population growth will fail or be only partially successful; that the physical resources comprising our ecologically unified environment will continue to be despoiled and exhausted; that technological developments, such as with respect to nuclear power or communications, will be used for destruction and oppression rather than for the construction and promotion of freedom; that all the major value processes of global society will become increasingly politicized, bureaucratized, and centralized; and so on. Whatever the particular problems with which one is concerned, it requires no specialized enlightenment or skills to ascribe some probability to this construct, and thus to view the future with some alarm.

Happily, it is not necessary, as was observed in our introductory inquiry about the relevance of thinking about the future, to regard any particular developmental constructs about the future as inevitable. The future may, in ways about which we do not yet have knowledge, be inevitable, but statements about the future are not inevitable and may be accorded differing indices of probability. The appropriate use of the anticipation of future contingencies is to employ it as a means for increasing the likelihood that humankind can avoid the undesirable and achieve the desirable. Such achievement must depend both upon the mobilization of peoples' attention and energies and the devising and execution of policy strategies appropriate to the major problems and opportunities of the global arena. However grim the prospects for a global public order that secures human dignity values, adverse estimates of probability cannot be permitted to affect personal and collective commitment to human dignity values as a fundamental and enduring goal.

VII. Alternatives For an Optimum Future World Public Order

If humankind is not to go the way of the dinosaur, it may behoove us to take measures. The culminating task in deliberately policy-oriented inquiry is the invention, evaluation, and selection of policy alternatives.[91] All the other tasks in the clarification of goals, description of trends, analysis of conditions, and projection of future possibilities are but preludes. The critical and difficult job is to devise strategies in decision that will span the gap between generalized goals and the more specific or aggregate outcomes sought in public order. This task, building upon performance in all the others, involves the identification of possible options in institution and practice, the comparative appraisal of such options in terms of both immediate and long-term costs and benefits in all values, and the making of necessary final commitments to decision and action. What is sought are options in institution and practice that will both facilitate the effective management of any particular problem upon which attention may be focused and yet contribute to the long-run effective management of the whole aggregate of major problems that besets contemporary public order.

There is of course no dearth in recommendation, either ancient or modern, about how global constitutive process and public order might be changed for the better.[92] For centuries philosophers, clerics, and kings have proffered plans for perpetual peace, and contemporary proposals for world government, and lesser modifications of the existing anarchy, abound. Some of these proposals envisage grandiose transformations in the structures and processes of authoritative and effective power, others, in contrast, are characterized by concern for small changes about particular problems in incremental, cosmetic gimmickry. The difficulty with the grandiose approach is that its proponents seldom offer the hands and feet necessary to put the vast changes they

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[91] The themes here are developed in more detail with references, in M. McDougal & F. Feliciano, *supra* note 47, at 261-383; Human Rights and World Public Order, *supra* note 28, at ch. 5; M. McDougal, H. Lasswell & I. Vlasic, *supra* note 64, at 1025-1103.

[92] For summary, see U.S. Dep't of State, Reform and Restructuring of the U.N. System, (Selected Documents No. 8, 1978); R. Angell, The Quest for World Order (1979); L. Berec & H. Targ, Reordering the Planet: Constructing Alternative World Futures (1974); M. McDougal & F. Feliciano, *supra* note 47, at 263-67, 367-75.

recommend into reality; the difficulty with the more humble approach is that the proponents of fragmented and anecdotal options offer little other than hands and feet, or isolated features of rule and procedure, without adequate relation to the larger processes of authoritative decision and effective power. Considered comprehensively most of the proposals share a but modest regard for the context of clarifying policies and conditions which affects both rationality and acceptability.

It may aid understanding of the necessities of a more comprehensive and systematic approach to recall the intimate interdependences, within any community, of constitutive process, public order decision, and all other value processes. The degree to which a community can achieve desired outcomes within any particular process is a function not merely of the economy of the institutional features of that particular value process, but also of the outcomes and features of all other value processes including especially those of the community's constitutive process and of the effective power process that maintains constitutive process. It is the constitutive process, through its protection and regulation of the different value processes, which determines the kind of public order a community can achieve; yet the kind of public order a community achieves (in terms of the shaping and sharing of wealth, enlightenment, skill, well-being, and so on), through a grip of converse determination, affects both effective power and the kind of constitutive process a community can maintain. Opportunities for change and improvement in global public order can, hence, be found not only in every feature of global constitutive process but also in every feature of inherited global public order and of the component power and other value processes. What is most urgently needed, in more rational approach, is understanding of these larger interrelationships and the establishment of institutional structures, both official and private, that can make systematic and continuous canvass of all features of global interaction for ascertaining the entire range of possible improvements and for establishing priorities among potential improvements in terms of conformity to human dignity, values, temporal needs, economy, effectiveness, and so on.

The range of potential, functionally equivalent improvements in institution and practice that might be employed in global constitutive process and public order decision to enhance the common interest in protecting and securing human dignity

values is almost infinite in detail and nuance. These possible improvements relate, as has been emphasized above, to every feature of both constitutive process and public order decisions. The literature about world government and lesser reforms of which we have been so critical, is filled with suggestions, and in earlier statements we have both reviewed and appraised these suggestions and ventured a few recommendations of our own.[93] Even an impressionistic itemization here, without careful references to overriding policies and the context of contemporary conditions, of what would appear to be among the more promising suggestions would, however, give a disproportionate sense of the importance of such particular possibilities. There can be no escape, if relevant improvement is to be effected, from the continuous, systematic, and disciplined appraisal of multiple, changing options in context.

The effective key to the improvement of global constitutive process and public order decision, to insuring that some of the many equivalent options for improvement are in fact put into practice, is of course to be found in the management of the global process of effective power, that is, through modification of the perspectives of the elite who maintain that process. Since in the contemporary global arena effective power is widely diffused and is based upon participation in all other value processes, this task becomes, most comprehensively, that of generating appropriate perspectives through all the global community's different value processes. It has already been suggested that it is the conflicting and disoriented perspectives of peoples—as manifested in demands for special interests, syndromes of parochial identifications and chronically unrealistic expectations—and not the inexorable requirements of technologically malleable environmental variables that perpetuate the existing difficulties in world public order. The maximization postulate, and the many historic successes of law as an instrument for the clarification of common interest, would suggest that the peoples of the world can, through appropriate modifications in perspectives, be encouraged toward the establishment of more effective processes of authoritative decision. It is a matter of scientific knowledge today that the

[93] *See* M. McDOUGAL & F. FELICIANO, *supra* note 47, at 261-383; M. McDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 64, at 1025-1103.

factors which importantly condition individual perspectives—such as culture, class, interest, personality and crisis—can be managed in a way to foster constructive rather than destructive perspectives. Competent specialists have long recommended promising alternatives in communication and collaboration designed to cultivate perspectives more appropriate to a public order of human dignity. In a very fundamental sense, this is one of the tasks of all education.

The distinctive kinds of perspectives—demands, identifications, and expectations—required for moving toward a more free, secure, and abundant global public order are more than implicit in our analysis above. In collaboration with associates, in a recent study of human rights, we summarized:

> The demands which need strengthening are, of course, those which emphasize common rather than special interests and which insist upon the greater production and wider sharing of all values compatible with human dignity. The identifications best designed to sustain a world public order of human dignity are those which most nearly embrace all humankind and achieve pluralistic expression in both functional and territorial groupings. Finally, the proponents of human dignity must establish in themselves and others credible expectations that they do accept the fundamental principle of minimum public order, precluding unauthorized coercion and violence, and that the peaceful cooperation of all peoples in the greater production and wider sharing of all values is a feasible and imperative goal. . . . The reality of contemporary interdependences, in all value processes at all community levels and transcending manifold barriers, must be brought home to all inhabitants of our planet.[94]

The task of generating and sustaining the perspectives indispensable to movement toward a more humane global public order thus requires, in sum, that all who cherish the values of human dignity—whether authoritative decision-makers, community members, scholars, or advocates—seize every opportunity to make the choices that favor and to create the public opinion that supports the values of human dignity. Changes in the direction of an improved constitutive process can be effected only if many

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[94] HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 28, at 444.

individuals, located in many different territorial and functional structures and processes about the globe, adopt both parallel and joint strategies to insure that the most fundamental, demanded policies are taken into account. The more intense the commitment and the more simultaneous the activities in many different parts of the world, the greater the possibilities of appropriate transformation, major or minor. There is, we repeat, a plentitude of equivalent models about features of both constitutive process and public order decision which could be adapted to serve the values of human dignity on a broad scale if peoples have the will to put such models into practice. The effective elites who establish and maintain authoritative decision must be made realistically to perceive that they and all with whom they identify have more to gain and less to lose by genuine efforts to change, rather than to continue, the arrangements and practices that promote human indignity and universal insecurity. The best hope that we can enjoy is perhaps to be found in the continuing, exploding demands of peoples around the world for the better securing of their human rights and in the realization, emphasized at the beginning of these lectures, that no future, however grim it may appear, can be known to be inevitable. An appropriate note of restrained optimism was voiced by my late colleague, Harold Lasswell, in concluding his book on *The Future of Political Science*:

> It is impossible to contemplate the present status of man without perceiving the cosmic roles that he and other advanced forms of life may eventually play. We are, perhaps, introducing self-awareness into cosmic process. With awareness of self comes deliberate formation and pursuit of value goals. For tens of thousands of years, man was accustomed to living in relatively local environments and to cooperating on a parochial scale. Today we are on the verge of exploring a habitat far less circumscribed than earth. The need for a worldwide system of public order—a comprehensive plan of cooperation—is fearfully urgent. From the interplay of the study and practice of cooperation we may eventually move more wisely, if not more rapidly, toward fulfilling the as-yet-mysterious potentialities of the cosmic process.[94]

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[95] H. LASSWELL, THE FUTURE OF POLITICAL SCIENCE 242 (1963).

COMMON LAW PROTECTION OF ECONOMIC EXPECTANCIES: "BUSINESS TORTS" IN MISSISSIPPI

William C. Walker, Jr.*

A single label which is both comprehensive and precise has yet to be applied to a relatively common situation: the plaintiff expects to achieve economic gain by selling his property or services but is thwarted by the intentional actions of the defendant. Or more precisely, defendant intentionally interferes with plaintiff's economic expectancies.

Although the *Restatement (Second) of Torts* seems adequately to characterize the above situation in a single section, "Intentional Interference with Prospective Contractual Relation,"[1] many other sections of the *Restatement* treat the same problem.[2] Indeed, the Council decided to delete from the *Second Restatement* several chapters included in the *First* dealing with interference with trade expectancies.[3]

Neither has the label "prima facie tort," although applied to the above circumstances, met with wide acceptance.[4] Its formulation would seem sufficiently comprehensive:

> Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.[5]

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[1] RESTATEMENT (SECOND) OF TORTS § 766B (1979).

[2] *See, e.g., id.* §§ 766, 623A.

[3] For a catalogue of areas deleted and an explanation thereof, see 4 RESTATEMENT (SECOND) OF TORTS, Introductory Note at 1-2.

[4] *See* Green, *Protection of Trade Relations Under Tort Law,* 47 VA. L. REV. 559, 571 (1961).

[5] Mogul S.S. Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598, 613 (1889). Mr. Justice Holmes also adopted the label: "It has been considered that, *prima facie,* the intentional

But "prima facie tort" fails to describe with acceptable precision. Traditional tort law categories persist.

Moreover, the stated situation may be governed not only by various tort formulations but by numerous legislative enactments and administrative regulations. State and federal anti-trust laws, trademark statutes, and Federal Trade Commission enforcement powers constitute only part of the picture.[6] Clearly, consideration of all of these would require several multi-volume treatises.[7]

Yet, despite this body of statutory and administrative law, the decisional law concerning intentional interference with economic expectancies remains viable. Indeed, the attorney faced with the set of facts previously described will often be forced to rely exclusively for guidance upon the common law of his jurisdiction. His dilemma will immediately be made apparent when he seeks a keyword to unlock the digests. He must search in vain for "prima facie tort," "business tort," "interference with economic expectancies," or any other all-inclusive label. When he discovers "unfair competition" or "trade regulation," he will also soon discover the limited application of those phrases.

This article will consider cases in Mississippi which treat certain modes of interference with economic relations. The cases to be considered are limited as follows:

1) Only economic injury is present.
2) Only third party interference is involved.
3) Only Mississippi, non-statutory law is considered.

The first characteristic deletes from consideration cases in which economic damage is parasitic to injury to person or property. The second eliminates mere refusals to deal and misrepresenta-

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infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

[6] For Mississippi anti-trust and trademark statutes respectively, see MISS. CODE ANN. §§ 75-21-1 to 75-21-39 & § 75-25-27 (1972); the Federal Trademark Act is found at 15 U.S.C. §§ 1951-1127 (1976); the Federal Trade Commission Act at 15 U.S.C. §§ 41-57(b) (1976); and the Federal Anti-Trust Laws at 15 U.S.C. §§ 1-7, 14 (1976).

[7] Some of the treatises include R. CALLMANN, UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES (3d ed. 1967); J. MCCARTHY, TRADEMARK AND UNFAIR COMPETITION (1973); H. TOULMIN, ANTI-TRUST LAWS (1949).

tion.[8] The third makes the topic manageable.[9]

Since no unifying label for the variety of cases exists, it is hoped that, through identification of applicable torts and analysis of their elements, this article will prove a tool useful in fashioning a more comprehensive and unified body of law for the protection of economic relations.

I. Intentional Interference with Prospective Contractual Relations

The title for this part mirrors *Restatement (Second) of Torts* section 766 B, and like that section includes intentional interferences with economic relations which do not fit under another tort formulation. Cases considered here are those not considered elsewhere under such labels as "intentional interference with existing contracts," "disparagement or trade libel," "palming off or unfair competition," and "trade secrets." But even this broad principle seems most often to apply only when precedent has crystallized specific rules relating to justification or, as the *Restatement*[10] puts it, whether the actor's conduct is to be deemed "improper." Indeed, in all these decisions, the important issue involves the propriety of the ends sought and the means used by the defendant in intentionally acting to interfere with the plaintiff's potential economic relations.

Before focusing on what is improper, examination of the broad rule of liability is in order. The *Restatement* announces the rule in section 766 B:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation . . . .[11]

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[8] Although third party misrepresentation could be discussed under the limiting characteristics, it is eliminated to avoid the necessity of treating the whole category of misrepresentation.

[9] The discussion is, of course, not comprehensive since potential statutory alterations are generally not considered.

[10] All references to the *Restatement* unless otherwise noted are to Restatement (Second) of Torts (1979).

[11] The quoted provision continues as follows:
whether the interference consists of

The official comment makes clear that the interest protected is broader than prospective "contracts" and includes, as well as prospective, formal, binding contracts, "prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation."[12] Thus, intentional and improper interference with economic expectancies renders the actor subject to liability under the *Restatement* rule.

Mississippi early recognized liability for malicious interference with business relations.[13] More recent decisions have followed suit: "Malicious interference with business relations of another is an actionable tort."[14] "*Wrongful* or malicious interference with the formation of a contract or the right to pursue a lawful business, calling, trade, or occupation has been generally held to constitute a tort."[15] The elements of a prima facie case have also been stated. Although announced in direct connection with an alleged interference with an existing contract, the rule is broad enough to cover prospective contracts as well:

> A prima facie case of wrongful interference with a contract [or prospective contract] is made out if it is alleged (1) that the acts were intentional and willful; (2) that they were calculated

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(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

RESTATEMENT (SECOND) OF TORTS § 766B (1979).

[12] *Id.*, Comment c.

[13] Globe & Rutgers Fire Ins. Co. v. Fireman's Fund Fire Ins. Co., 97 Miss. 148, 162, 52 So. 454, 456 (1910) (defendant's purpose for inducing plaintiff's employee to come to work for him was not to further his own business but rather to destroy plaintiff's business); Wesley v. Native Lumber Co., 97 Miss. 814, 820, 53 So. 346, 346-47 (1910) (an otherwise lawful act becomes unlawful if accompanied by a malicious purpose to injure the business of another).

[14] Irby v. Citizens Nat'l Bank of Meridian, 239 Miss. 64, 67, 121 So. 2d 118, 119 (1960). *Accord,* Leonard Ducksworth, Inc. v. Michael L. Field & Co., 516 F.2d 952, 955 (5th Cir. 1975) (reasonable expectancy of a prospective contract is a property right to be protected); Edwards v. Anaconda Co., 115 Ariz. 313, 565 P.2d 190, 192 (1977) (Arizona recognizes the tort of intentional interference with business expectancy); Martin v. Phillips Petroleum Co., 455 S.W.2d 429, 435 (Tex. 1970) (Texas recognizes a cause of action for improper interference with prospective contractual relations).

[15] Bailey v. Richards, 236 Miss. 523, 536, 111 So. 2d 402, 407 (1959) (quoting 86 C.J.S. *Torts* § 43 (1954)).

> to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted.[16]

The rule is, therefore, that one who has interfered intentionally with another's business expectancies is liable to the aggrieved party at least under certain circumstances. These circumstances include the usual tort requirement of causation and the further requirement of lack of justification. Although causation will be considered at the end of this section, for purposes of the following discussion, its existence will be assumed. At present, the focus will be upon the "malice/justification/improper" problem.

Perhaps most often a defendant intentionally interferes with a plaintiff's economic expectancies in order to appropriate to himself the plaintiff's hoped-for gain. Indeed, the highly esteemed concept of free competition depends upon a rival businessman's seeking to attract a limited group of customers and thereby necessarily intentionally interfering with his rival's economic expectancy of contracting with those same customers. Thus, if defendant's motive is to compete, perhaps he should not be subject to liability, at least if the competitive act does not qualify as a separate tort or is not otherwise "wrongful." This approach has been adopted by the *Restatement* and generally by the courts:

> (1) One who intentionally causes a third party not to enter into a prospective contractual relation with another who is his competitor . . . does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint of trade and
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> (d) his purpose is at least in part to advance his interest in competing with the other . . . .[17]

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[16] 239 Miss. at 67, 121 So. 2d at 119.

[17] RESTATEMENT (SECOND) OF TORTS § 768 (1979).

Thus, a defendant motivated by competitive zeal does not, without more, interfere improperly with the economic expectancies of another. Indeed, the *Restatement* rule applies even if the defendant is motivated only "in part" by competition.

Still, a competitor's intentional interference with his rival may be found improper and subject the actor to liability.[18] This contradiction with the announced "competition privilege" results from the double meaning of "improper." That term describes both the legitimacy of the ends sought by the defendant and of the means used by him. If either the ends sought or the means used are inappropriate ("unlawful"), the interference is improper and the defendant is subject to liability.

In *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey,*[19] the Mississippi Supreme Court found that the end sought by the defendant, who intentionally interfered with the plaintiff's economic expectancies by cutting cleaning prices, was improper. After the plaintiff refused to raise his prices at the defendant's request, the defendant cut its prices far below those of the plaintiff in spite of resulting short term losses. Although it could be argued that the defendant's purpose was at least in part to advance its interest in competing with the plaintiff, the court thought the competition privilege inapplicable to the facts of the case:

> While it is true that competition in business, though carried to the extent of ruining a rival, is ordinarily not actionable, unless the dominant purpose to inflict injury is established, we are of the opinion that the jury was warranted in finding that the purpose to injure or destroy the business of the plaintiff was dominant throughout the period complained of . . . .[20]

The court seems to say that the defendant's purpose, though in part to advance its interest in competing with the plaintiff, was *chiefly* to destroy the rival's business. Thus, the court seems to announce a rule different from the one offered by the *Restate-*

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[18] *See* Edwards v. Anaconda Co., 115 Ariz. 313, 565 P.2d 190, 193 (1977) (the competition privilege doesn't extend to improper means).

[19] 192 Miss. 224, 5 So. 2d 227 (1941).

[20] *Id.* at 239, 5 So. 2d at 232.

ment.[21] It is true that a leading case has held that engaging in a competing enterprise and cutting prices to attract customers in the absence of a desire to derive benefit but *merely* to ruin a plaintiff's business is actionable.[22] However, that case and others like it[23] stand for the proposition that if the end sought is appropriation of the rival's economic expectancies the defendant's purpose is not improper. These cases and the *Restatement* seem to indicate that interference with a competitor is "proper" if appropriation is its end even though ruination of the latter is an intermediate step for achieving that end.

Of course, the means used in *Memphis Steam Laundry-Cleaners,* price-cutting of such severity as to destroy the rival business, might be viewed as improper and as giving rise to liability. But the court, perhaps in view of common law decisions finding price-cutting acceptable,[24] chose not to base its decision upon the wrongfulness of these means. Instead, the decision depends upon the traditional, but troublesome, semantic basis for the cause of action—"malice." The imprecision of that term and the resulting confusion have been made apparent in the "constitutional malice" rubric appearing in defamation cases.[25] Nevertheless, malice has long been associated with intentional interference with economic expectancies. The seminal Mississippi

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[21] For the *Restatement* rule, see note 17 and accompanying text *supra.* Note that in reaching its conclusion the court did not rely on the anti-competitive effect of such price cutting or of defendant's desire to monopolize. Either could be viewed as actions to create an unlawful restraint of trade and an exception to the *Restatement* rule regarding competitive motive. *See* Miss. Code. Ann. § 75-21-3 (1972).

[22] Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909).

[23] *See, e.g.,* Katz v. Kapper, 7 Cal. App. 2d 1, 44 P.2d 1060 (1935) (holding that underselling plaintiff to appropriate his business was neither an unlawful purpose nor involved unlawful means).

[24] *See, e.g., id.; cf.* the court's analysis of *Memphis Steam Laundry-Cleaners* in a later decision:

> In that case we held that the reduction of prices is an absolute right of the owner of a business and is lawful of itself, but under the guise of exercising an absolute right, it is not lawful indirectly to interfere with the business, employment, or occupation of a third person, where the exercise of the right was with the object of injuring the third person rather than primarily of benefiting the person exercising the right.

Wagley v. Colonial Baking Co., 208 Miss. 815, 850, 45 So. 2d 717, 722 (1950).

[25] *See* Wade, *The Communicative Torts and the First Amendment,* 48 Miss. L.J. 671, 711 (1977).

decision relied upon in *Memphis Steam Laundry-Cleaners* states the rule of liability in terms of malice: " 'Surely no individual or corporation may maliciously and wantonly set about to ruin a competitor . . . .' "[26] Unfortunately, malice has three meanings in this context: 1) acting out of spite or ill-will, 2) seeking non-legitimate ends in general, and 3) using inappropriate means to achieve the ends sought. It should be noted that 1) is a sub-category of 2); nevertheless, the malice label has been used as if "ill-will" and "without justification" are entirely distinct terms. It is submitted that ill-will malice is simply one example of an improper purpose or end. If this fact were recognized, the term could be used without confusion. But if the term is avoided altogether, as when ill-will malice is clearly absent from the facts, a court may focus more clearly upon the legitimacy of the defendant's purpose. In such a situation, the competition privilege will survive intact.

In *Quality Stamps Co. v. Page's Supermarkets,*[27] the court impliedly recognized fighting to retain customers (arguably the defendant's primary purpose/end in *Memphis Steam Laundry-Cleaner's*) as justification for an intentional interference with the plaintiff's economic expectancies. After the plaintiff and the defendant had terminated a contract for the defendant's distribution of the plaintiff's stamps, the defendant announced that it would distribute S & H Stamps to its customers. The plaintiff simultaneously mailed out coupons to potential customers of both the defendant and its competitors redeemable for 100 Quality Stamps with the purchase of certain designated grocery items at food stores giving those stamps. The defendant countered by offering to redeem the same coupons with S & H Stamps. The plaintiff's argument that the defendant's act was tortious was rejected by the court without citation to any authority:

> In our view, none of the authorities [relied upon by plaintiff]

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[26] 192 Miss. at 239, 5 So. 2d at 232 (1941) (citing Globe & Rutgers Fire Ins. Co. v. Fireman's Fund Fire Ins. Co., 97 Miss. 148, 161, 52 So. 454, 455 (1910)). *Accord*, Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316, 320 (D. Mass. 1966) (interference can be justified on the grounds of competition, but not if the motivation was malicious or wanton).

[27] 246 Miss. 112, 149 So. 2d 348 (1963).

> are directly in point. We are of the opinion that under the particular facts and circumstances of this case appellee was justified in offering to redeem the coupons mailed out by appellant as a defensive measure to prevent serious loss of customers at a critical time when he was changing over to the use of a new stamp.[28]

In short, the court at least impliedly recognized the competition privilege. Of course, this case is readily distinguishable from *Memphis Steam Laundry-Cleaners* since the defendant was not attempting to eliminate a competitor in the name of competition but was arguably seeking only to protect customers it already had. In addition, the coupon redemption is probably not as objectionable as price-cutting, even though both are happy windfalls to potential customers. Nevertheless, *Quality Stamps* makes apparent the ease with which the interference problem may be analyzed if malice is not at issue. Here legitimate ends were apparently sought by use of acceptable means.

Unfortunately, confusing terms other than "malice" have been used to classify the interference under consideration. "Boycott" is such an example. However, if this term is analyzed, it will be seen that instead of changing the two-part analysis of the cause of action, "boycott" merely describes a factual situation in which the competition privilege is necessarily inapplicable. The boycott pattern involves a defendant's seeking to prevent others from trading with a plaintiff without the purpose of appropriating the plaintiff's resulting lost economic expectancies. Clearly, the defendant is not seeking to advance his interest in competition. But the defendant's purpose may still be legitimate: *e.g.*, 1) protecting his financial interest in the potential customer's business,[29] 2) advancing the welfare of the potential customer for whom he is responsible,[30] 3) under limited circumstances seeking

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[28] *Id.* at 116, 149 So. 2d at 350.

[29] The *Restatement* provides:

> One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another does not interfere improperly with the other's relation if he
>
> (a) does not employ wrongful means and
>
> (b) acts to protect his interest from being prejudiced by the relation.

RESTATEMENT (SECOND) OF TORTS § 769 (1979).

[30] The *Restatement* provides:

to influence the business policy of plaintiff,[31] or 4) giving honest advice.[32]

If, however, no legitimate end is sought, the defendant is subject to liability. In an early Mississippi case fitting the boycott pattern but avoiding use of that label, the defendant was found subject to liability for intentional interference with the plaintiff's mercantile business. The Mississippi Supreme Court, in *Wesley v. Native Lumber Co.*,[33] made no mention of a purpose to appropriate plaintiff's business nor the use of improper means. Indeed, defendant's acts included only threatening to discharge and discharging at least some of its employees who traded with plaintiff. The court characterized the case simply as malicious injury of plaintiff's business by inducing others not to trade:

> It is true a person has the right to refuse to have business relations with any person whomsoever, whether his refusal is the result of caprice or malice, without laying himself liable to action therefor; but he cannot from such motives, influence

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One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor

(a) does not employ wrongful means and

(b) acts to protect the welfare of the third person.

Id. § 770.

[31] The *Restatement* provides:

One who intentionally causes a third person not to enter into a prospective contractual relation with another in order to influence the other's policy in the conduct of his business does not interfere improperly with the other's relation if

(a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and

(b) the desired policy does not unlawfully restrain trade or otherwise violate an established public policy and

(c) the means employed are not wrongful.

Id. § 771.

[32] The *Restatement* provides:

One who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not inferfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.

Id. § 772.

[33] 97 Miss. 814, 53 So. 346 (1910).

> others to the same course, for the purpose of injuring the business of such other. The act and the accompanying motive together constitute the unlawful act.[34]

The case stands for the proposition that intentional injury to the plaintiff's business by inducing third parties not to trade, when not actuated by a legitimate purpose, is an actionable tort. Such is the result even if the means used are not otherwise wrongful.

By relying on the second meaning of improper, courts have found liability even where a legitimate purpose motivated the defendant. Therefore, where unacceptable means are used to bring about the interference, the defendant is subject to liability.[35] The earliest cases involved the use of so-called predatory means—acts that are tortious in themselves as to some person involved even if not as to the plaintiff. Thus, a defendant's committing battery upon a plaintiff's potential customers to prevent them from trading with the plaintiff, even if motivated by legitimate concerns including competition, is actionable since improper means have been employed.[36]

Another act that is tortious as to the party seeking to trade with the plaintiff and which would be expected to subject the defendant to liability for the interference is deceit.[37] Nevertheless, while liability has been found under these circumstances if comprehended by other tort labels such as disparagement or, occasionally, intentional interference with existing contracts, the common law decisions have been reluctant, apparently on proof of causation grounds, to extend liability to cases of false advertising.[38]

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[34] *Id.* at 820, 53 So. at 347. *See also,* Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316, 320 (D. Mass. 1966) (it is prima facie unlawful to induce a third person not to deal with the plaintiff where defendant knew of negotiations).

[35] For the factors considered in determining whether an interference is improper, see RESTATEMENT (SECOND) OF TORTS § 767 (1979).

[36] *See* RESTATEMENT (SECOND) OF TORTS § 766B, Comment b (1979).

[37] *See id.* § 767, Comment c (discussing fraudulent misrepresentations).

[38] For a discussion of the liability of a competitor for false advertising at common law, under certain state statutes, and under § 43(a) of the Lanham Act, see R. CALLMANN, 1 UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 18.1-18.2 (3d ed. 1967). Although liability for false advertising in general is beyond the scope of this article, one Mississippi statute should not be overlooked. *See* MISS. CODE ANN. § 97-23-2 (1972) (expressly providing for a civil action in tort against a violator).

Like disparagement, conspiracy has served as an appropriate tort formulation for imposing liability in interference with economic expectancy cases.[39] But in contrast to the other label, conspiracy actually is not a separate tort. Indeed, it merely describes an improper mode of interference. The definition contained in *Southern Christian Leadership Conference v. A.G. Corp.*[40] reveals the problem: "A sufficient definition of conspiracy is 'a combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully.' "[41] If the purpose behind the interference is "unlawful," a legitimate end is not sought thereby, and even a single defendant is subject to liability for intentional interference with prospective contractual relations. If the purpose is "lawful" but the means used are "unlawful," a single defendant is subject to liability for the same tort. Nevertheless, the conspiracy label as applied to certain factual situations provides insight into the meaning of unlawful or improper means. Thus, the mere joining of two or more for the single purpose of intentionally interfering with the plaintiff's trade expectancies has been viewed as improper.[42] The combination is itself the improper means. In addition, conspiracy cases have expanded the list of improper means. Indeed, in *Southern Christian Leadership Conference* and its precedent,[43] the focus was upon arguably non-tortious means used to boycott and to strike. In both cases, the unlawful or improper means test depended upon the "use of force, violence, coercion, or intimidation. . . ."[44] Of course, if force or violence is used, a separate tort as to the victim of such use is made out. However, coercion and intimidation do not so easily fit into a traditional tort category. It must be noted that these acts might not be viewed as improper means if only a single defendant is involved. Indeed, the presence of coercion or in-

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[39] *See, e.g.*, Moore v. Johnson, 568 F.2d 1184, 1185-86 (5th Cir. 1978) (holding that real estate broker's claim that seller and purchase conspired to defraud plaintiff of his commission was correctly submitted to the jury).

[40] 241 So. 2d 619 (Miss. 1970).

[41] *Id.* at 623 (quoting 15A C.J.S. *Conspiracy* § 1 (1967)).

[42] *See* Jackson v. Stanfield, 137 Ind. 592, 36 N.E. 345 (1894).

[43] Southern Bus Lines, Inc. v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America, 205 Miss. 354, 38 So. 2d 765 (1949).

[44] 241 So. 2d at 624 (quoting Southern Bus Lines, Inc. v. Amagamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America, 205 Miss. at 374, 38 So. 2d at 768.

timidation could be read as merely negating the legitimacy of the otherwise arguably legitimate ends sought. Still, such a possibility should not distort the general rule that, in many cases of interference, a combination makes the defendant subject to liability[45] for the use of wrongful means.

In summary, Mississippi courts have recognized the tort of intentional interference with prospective contractual relations in a manner generally consistent with the *Restatement* rules on this subject. Although the use of various labels to characterize the cause of action has led to some confusion, an analysis of the cases reveals the following issues:

> 1) Did the defendant intentionally interfere with plaintiff's prospective contractual relations?
> 2) Did the defendant seek to accomplish some non-legitimate (improper) purpose by doing so?
> 3) Did the defendant use wrongful (improper) means in seeking to accomplish the interference?

At the lowest threshold, the defendant is subject to liability only if the answers to questions 1) and either 2) or 3) are affirmative. Moreover, the defendant will be held liable only if his acts resulted in injury to the plaintiff's economic expectancies—*i.e.*, plaintiff must prove "causation."

In *Harrison v. Prather,*[46] the Fifth Circuit, recognizing the Mississippi rule upon the subject,[47] addressed the causation question in a case involving intentional interference with a prospective contract. According to the plaintiff, after he made an application to Prudential for a loan, the defendant stated that he knew who could "stop" a loan application and that the loan was "killed" by one Pickett Myers at the defendant's direction.[48] The

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[45] The conspiracy label may be effectively used to establish both joint and several liability. 241 So. 2d at 625.

[46] 435 F.2d 1168 (5th Cir. 1970), *cert. denied*, 404 U.S. 829 (1971).

[47] The Mississippi rule, which is in harmony with the majority rule, is as follows:

> The jury was warranted in believing that the appellee had a *reasonable expectation* of the contract's being consummated except for the influence and interference of the appellants. (emphasis added).

435 F.2d at 1173 (quoting Bailey v. Richards, 236 Miss. 523, 534-35, 111 So. 2d 402, 406 (1959)).

[48] 435 F.2d at 1170.

defendant's witnesses employed by Prudential testified that Pickett Myers did not influence their decision but that the incompleteness of the plaintiff's loan application, his weak financial statement, and the nature of the security caused the loan to be denied. In spite of the jury's specific findings that the defendant "willfully and maliciously interfered with the granting of a loan by Prudential"[49] and that the defendant's "interference proximately contributed in whole or in part to the decision of Prudential to decline the loan,"[50] the appellate court reversed the trial court.[51] The reason for the reversal turned upon the phrasing of the following interrogatory—"Do you believe from a preponderance of the evidence that the defendant's interference was the proximate cause of Prudential not making the loan?"[52] —which construction was changed by the trial judge's crossing out "the" before proximate cause and substituting "a" in its place.[53] The court distinguished "the" from "a" proximate cause by equating the former with the "but for"[54] causation requirement. Under the "but for" test, the court thought the jury should have been instructed, although not in so many words, that it "could not affix liability unless they found that without the defendant's acts Prudential would have approved the loan."[55]

The problem with this decision and its state court precedent involves a failure to distinguish between causation in fact[56] and legal cause[57]—the two parts of what has been traditionally labeled "proximate cause." It is certainly true that a defendant in any tort case may not be held liable unless his breach of duty is the cause in fact of the plaintiff's injury. Therefore, if something else caused the loan to be denied, defendant is not liable. However, occasionally the so-called "but for" equation for cause in

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 1171.

[52] *Id.*

[53] *Id.*

[54] The "but for" test requires the plaintiff to prove that the wrong would not have occurred without the defendant's wrongful act. *Id.* at 1172. See *id.* for a thorough discussion of the "but for" test and the broader "proximate cause" test.

[55] *Id.* at 1172.

[56] W. PROSSER, LAW OF TORTS § 41 at 237 (4th ed. 1971).

[57] *Id.* § 42 at 244.

fact breaks down. If two persons intentionally and improperly interfere with the plaintiff's prospective contract and if the prospective contract is, as a result, never realized, neither should avoid liability merely because his act alone would not have resulted in the plaintiff's lost expectancy. The classic case of the two fires is well known to all first-year tort students.[58] On the other hand, even if the defendant caused in fact the plaintiff's injury, liability may be denied if legal cause is absent. Legal cause depends upon a judicial decision to include the results of the defendant's act within the appropriate circle of liability. Thus, the defendant's act must be *the* legal cause of the plaintiff's injury but may, in some circumstances, be only *a* cause in fact.

In spite of the court's failure to separate the two parts of "proximate cause," the decision is probably correct. The jury could easily have been misled into interpreting the obviously altered instruction as imposing liability even if the defendant's act of intentional and improper interference with the potential loan was not a substantial contributing cause of its denial. In addition, the court and its precedent may be correct on legal cause grounds in constricting the circle of liability in interference with prospective contracts cases more than in interference with existing contracts:

> The logic of applying this narrow gauge for recovery is to be found in the nature of the tort alleged. The plaintiff is not seeking recovery for damages received because something the defendant did has harmed his established and existing right, but, to the contrary, because an expected benefit was not received.[59]

But the quoted distinction, if read as characterizing one kind of interference as a right and the other as an expectancy, overlooks the fact that the *right* to be free from intentional and improper

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[58] *See, e.g.*, Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920) (the "two fires" case stands for the proposition that if two fires, one started by the defendant and the other of unknown origin, combine and the fire of unknown origin by itself would have destroyed the plaintiff's property anyway, the defendant is still liable), *rev'd on other grounds sub nom.* Borstein v. Great Northern Ry. Co., 149 Minn. 210, 183 N.W. 519 (1921).

[59] 435 F.2d at 1172.

interference with a prospective contract is the *raison d'être* of the tort in question.

Nevertheless, what is proper in cases of interference with prospective contracts may be improper when the contract is a current reality. But that is the subject of the next part.

II. Intentional Interference with an Existing Contract

The general rule of liability for intentional interference with an existing contract by a person not a party to the contract is basically the same as the rule considered in connection with prospective contracts. Indeed, the difference between the two actions is chiefly limited to the question of the impropriety of ends and means which, in the tort under consideration, is often more comprehensive than in the case of prospective contracts.[60] Consequently, much of the following will provide additional illustration of elements previously analyzed; but it will also be seen that privileges applicable to interference with prospective contracts do not necessarily apply to interference with extant contracts.

The *Restatement* announces the broad rule of liability in section 766:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other . . . from the failure of the third person to perform the contract.[61]

The elements of a prima facie case consistent with the above rule were announced by the Mississippi Supreme Court in *Irby v. Citizens National Bank*[62] and have already been set forth. In addition, that case makes clear that a defendant's interference can be viewed as intentional only if he knew of the existing con-

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[60] Restatement (Second) of Torts §§ 766, Comment b, 768 (1979).

[61] *Id.* at § 766. *Accord*, American Sur. Co. v. Schottenbauer, 257 F.2d 6, 10 (8th Cir. 1958) (wrongful interference with a contractual right is actionable in Minnesota); Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316, 320 (D. Mass. 1966) (it is an actionable tort); Clements v. Withers, 437 S.W.2d 818 (Tex. 1969) (recovery allowed where defendant tortiously induced breach of an existing contract).

[62] 239 Miss. 64, 121 So. 118 (1960). See text accompanying note 16 *supra*.

tract: " 'It is essential both to aver and prove the defendant's knowledge of the contract in question.' "[63] Thus, a defendant's intentional and improper interference with a plaintiff's existing contract renders the former subject to liability.

Of course, even if the interference is intentional, an improper purpose or method of interference must nevertheless be present. This additional requirement may be termed *malicious* interference[64]—the label often used in the decisions. But as previously pointed out in this article, a two-part analysis of "improper" reduces confusion that traditional labels often exacerbate. And although the decisions do not always fit neatly in improper purpose or improper means categories, the following discussion will focus on these phrases in turn.

Although competition is not a proper purpose in interference with existing contracts, other ends may be legitimate and serve as justification for the defendant's intentional act:

> [A]n existing contract, if not terminable at will, involves interests that are not subject to interference on the basis of competition alone. However, the fact that the actor is not justified on the basis of competition is not conclusive of his liability. His action may be justified for other reasons.[65]

It must be admitted that confusion over the competition privilege and the treatment of interference with prospective contracts and existing contracts under one label—interference with business—make supporting the above rule more difficult. But it is not the unsoundness of the rule which causes the problem, but rather a failure to analyze the privilege and its application to the

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[63] 239 Miss. at 67, 121 So. 2d at 119; *accord,* Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316, 320 (D. Mass. 1966) (defendant must have notice of the existence of the contract).

[64] A district court's attempt to define this magic label follows: "Malice in this context is the intentional doing of a harmful act without justification or excuse or stated differently, the wilful violation of a known right." Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1199-1200 (N.D. Miss. 1970). *See, e.g.,* Employees Liab. Assurance Corp. v. Freeman, 229 F.2d 547, 550-51 (10th Cir. 1955) (if malicious interference then liable).

[65] RESTATEMENT (SECOND) OF TORTS § 768, Comment a (1979). *Cf.* Employees Liab. Assurance Corp. v. Freeman, 229 F.2d 547, 550-51 (10th Cir. 1955) (if employ fair means and act in good faith for protection of legal rights, then not liable even if interference with contract).

particular interference. Thus, in *Globe & Rutgers Fire Ins. Co. v. Fireman's Fund Ins. Co.*,[66] the Mississippi Supreme Court held that the plaintiff had stated a cause of action for malicious interference with its rights by alleging that its competitor had induced the plaintiff's employee to leave its service. The court thought the competition privilege inapplicable since the plaintiff had alleged that the defendant's purpose was to destroy the plaintiff's business by procuring the breach of contract. Moreover, the court rejected the defendant's argument that liability for this interference could not be imposed since the employment contract was terminable at will.[67] It is true that the competition privilege might not be applicable to the instant case since the defendant was in the business of selling insurance, not of hiring employees. But it is not true "that it makes . . . [no] difference whether there was a contract between plaintiff and Lawrence for a definite period of time or not."[68] Interference with contracts terminable at will is protected by the competition privilege.[69]

Protection of the actor's own legally protected interests has been recognized as a proper purpose which justifies an interference with an existing contract.[70] In *Standard Fruit & Steamship Co. v. Putnam*,[71] the Mississippi Supreme Court ruled that an intentional interference with the plaintiff's employment contract was privileged in view of the defendant's purpose for the arguably tortious conduct involved. The plaintiff, who had earlier recovered a $25,000 verdict against the defendant for injuries sustained on the premises in question, alleged that the defendant's refusal to allow him admittance to the terminal resulted in his

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[66] 97 Miss. 148, 52 So. 454 (1910).

[67] *Id.* at 164, 52 So. at 456.

[68] *Id.*, 52 So. at 456.

[69] The majority rule is that a contract terminable at will is immaterial to a third person's liability for procuring a breach of contract. American Sur. Co. v. Schottenbauer, 257 F.2d 6 (8th Cir. 1958) (involved an employment contract).

[70] One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT (SECOND) OF TORTS § 773 (1979). See note 65 *supra*.

[71] 290 So. 2d 612 (Miss. 1974).

being discharged by his employer. Although the court was unconvinced that the defendant intentionally caused the plaintiff's discharge,[72] it relied most directly upon the presence of privilege in reversing the trial court. Two "absolute" privileges were recognized: "(1) rights incident to the ownership of property interests, and (2) rights to enter or refuse to enter into contractual relationships."[73] The court concluded that the defendant

> having knowledge of Putnam's history of accidents and resulting injuries as detailed in this opinion, acted reasonably within his qualified (if not absolute) privilege to exclude Putnam from the compact area which contained such an intense concentration of vehicles, complicated equipment, moving traffic, and over three hundred employees.[74]

The opinion recognizes a privilege of one in possession of real estate to exclude another who is susceptible to accident even if the act results in the plaintiff's loss of employment. The privilege recognized is really based upon the defendant's legitimate (*i.e.*, not improper) purpose for his acts.

In *Martin v. Texaco, Inc.*,[75] the federal district court held that the defendant's communicating by letter to one who had orally contracted to purchase certain real and personal property from the plaintiff did not amount to an actionable interference with the plaintiff's contract.[76] Recognizing that no Mississippi case had decided whether a contract must satisfy the Statute of Frauds in order to be the basis of a suit for interference[77] and that this question had been decided both ways in other jurisdictions, the court adopted the rule that for actionable interference with contract, the contract must comply with the Statute of Frauds:

> [T]his court agrees with the Texas Court of Civil Appeals which, in a case involving the same legal principle, held that it would be legally incomprehensible that defendant would be lia-

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[72] *Id.* at 615 (plaintiff's loss of job was an incidental result of defendant's action).
[73] *Id.* at 614.
[74] *Id.* at 616.
[75] 304 F. Supp. 498 (S.D. Miss. 1969).
[76] *Id.* at 501.
[77] *Id.*

> ble for interfering with a contract which was itself not actionable, particularly here where Texaco's interest or rights were legally and factually intertwined.[78]

Fortunately, the last phrase of the above quotation correctly focuses on the justification issue. Unfortunately, the court's recognition of a split of authority on the Statute of Frauds question and of the personal right to assert the Statute of Frauds belies the conclusion that a different rule is "legally incomprehensible." Indeed, the *Restatement* is clearly at odds with the adopted rule:

> The third person may have a defense against action on the contract that would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted to interfere improperly. Thus, by reason of the statute of frauds . . . the third person may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided.[79]

The decision, in failing to recognize an actionable interference on the basis of noncompliance with the Statute of Frauds, misses the point—a voidable contract cannot be voided by one not a party to it.

It must be admitted that the court's focus upon Texaco's relationship to the contract is appropriate, even though Texaco may not unilaterally void it. Rather, the defendant's interest in the subject matter of the contract makes its interference not improper. Indeed, the opinion recognizes this fact and relies upon it:

> Federal Courts and State Courts, including those of the State of Mississippi have adhered to the principle of law that even if a party "interferes" with the formation or execution of a contract, if he has a legitimate interest therein or a contractual right to perform said act it is privileged and thus not wrongful and actionable.[80]

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[78] *Id.*

[79] RESTATEMENT (SECOND) OF TORTS § 766, Comment f (1979).

[80] 304 F. Supp. at 502. *Accord,* Johnson v. Warnaco, Inc., 426 F. Supp. 44, 47 (S.D.

The decision is, therefore, correct since defendant's interference was for a proper purpose[81]—to point out Texaco's rights under its arrangement with plaintiff.

If improper means are used to perpetrate the interference with an existing contract, the actor is subject to liability even if his purpose is proper. Thus, if the means used for the interference include deceit, defendant is subject to liability. In *Mississippi Power Co. v. City of Starkville,*[82] the defendant, Fairbanks, Morse & Co., in the course of a pre-election campaign for a bond issue to make possible Starkville's opening its own power plant to be purchased from Fairbanks, Morse & Co., with reckless disregard of the truth or falsity or with knowledge of the falsity, paid for false and misleading advertisements reporting that the plaintiff had given away its stock to prominent men in Mississippi for the purpose of controlling them.[83] The court ruled that the use of deceit negated any justification for the act and enjoined Fairbanks, Morse & Co. from entering into a contract with the city.[84]

Of course, other improper means, including conspiracy, may negate any privilege asserted by way of a proper purpose or legitimate interest.[85] But even if the interference is improper in either its purpose or means, causation must be proved to hold defendant liable.

The causation question previously considered in connection with prospective contracts[86] has been resolved similarly in cases of existing contracts. In *Ross v. Deposit Guaranty National Bank,*[87] liability was not imposed since "the plaintiffs failed to prove that the value of their stock would not have been destroyed *but for* a wrongful interference by the defendants or ei-

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Miss. 1976) (if a person who interferes has a legitimate right or interest, it is called "privileged interference"). See note 65 *supra.*

[81] 304 F. Supp. at 504.

[82] 4 F. Supp. 833 (N.D. Miss. 1932).

[83] *Id.* at 835.

[84] *Id.* at 837.

[85] For decisions dealing more or less directly with conspiracy in this context, see Moore v. Johnson, 568 F.2d 1184 (5th Cir. 1978); Ross v. Deposit Guar. Nat'l Bank, 400 F. Supp. 45 (S.D. Miss. 1974); Isett v. Farrington, 249 So. 2d 649 (Miss. 1971).

[86] See notes 46 through 59 and accompanying text *supra.*

[87] 400 F. Supp. 45 (S.D. Miss. 1974).

ther of them."[88] In *MacLeod v. Vest Transportation Co.*,[89] plaintiffs, attorneys who had entered into a contingent fee contract under questionable circumstances with the defendant's employee's widow, were denied an injunction preventing the defendant from settling a claim with their "client," the widow who had discharged them. The court found no evidence that the defendant had anything to do with the plaintiffs' client's alleged breach.[90]

If the defendant's purpose or actions are improper and cause an interference with the plaintiff's existing contract, the question of relief is raised. Injunctive relief has been given,[91] but in most instances damages are sought. The most troublesome question presented in this connection was correctly answered in *Mid-Continent Telephone Corp. v. Home Telephone Co.*[92] The court, apparently in recognition of the separate right interfered with—the right to have contracts protected from improper interference—ruled that the possibility of damages against the breaching party did not affect the right to damages against the defendant: "That the injured party also has a right of action for damages *ex contractu* against the party who breached the contract is not a defense to the interference action."[93] The decision also correctly states other rules of damages: 1) wholly speculative damages based on conjectural profits may not be recovered; 2) consequential damages are recoverable; 3) punitive damages may be appropriate.[94] In sum, the general rules of damages for injury to intangible interests apply.

A relatively recent Mississippi case sheds an interesting light on damages in such a case and on the limitation of liability for the tort in the face of a statute treating the subject matter of the contract terminated as a result of the interference. In *South-*

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[88] *Id.* at 52.

[89] 235 F. Supp. 369 (N.D. Miss. 1964).

[90] *Id.* at 372.

[91] *See, e.g.*, Mississippi Power Co. v. City of Starkville, 4 F. Supp. 833 (N.D. Miss. 1932); RESTATEMENT (SECOND) OF TORTS § 774A, Comment f (1979).

[92] 319 F. Supp. 1176 (N.D. Miss. 1970).

[93] *Id.* at 1200.

[94] *Id.; see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 774A (1979). *See also* Clements v. Withers, 437 S.W.2d 818 (Tex. 1969) (compensatory damages where defendant induced a breach of an existing contract).

west Drug Co. v. Howard Bros. Pharmacy,[95] after recognizing the general rule of liability for intentional interference with an existing contract, the court held that section 89-7-25 of the Mississippi Code Annotated limited recovery against a tenant for holding over after termination of its lease.[96] Thus, since the defendant had refused to deliver up the leased premises and thereby prevented the plaintiff from taking possession, forcing termination of the latter's lease contract with the tenant's landlord, the court thought landlord and tenant law limited recovery for the interference in question. In effect, the decision limits recovery for intentional and improper interference with a lease contract by holding over to the statutory penalty for breach of contract. But the suit by the plaintiff was not for breach of contract; rather, it was for tortious interference with contract. The tort measure of damages in such a case should apply, especially since liability may not be imposed unless the defendant acts intentionally to interfere with the contract in question. The decision uses a statute apparently designed to punish a hold-over tenant by increasing contractual damages to protect the tenant from full liability for an intentional tort. Nevertheless, the case warns plaintiffs in cases of an intentional interference with existing contracts or, indeed, with prospective contracts that such actions may be subject to more stringent or at least different standards if the method of bringing about the interference fits a traditional substantive pidgeon hole.[97] The next part of this article will consider just such a situation.

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[95] 320 So. 2d at 776 (Miss. 1975).

[96] *Id.* at 779. *Accord,* Crawford v. Shelton, 378 So. 2d 652 (Miss. 1980) (the court held that the defendant's inducement of the plaintiffs' lessee to break the lease, stated a cause of action under the common law for a wilful interference with a contract; recovery was limited to actual damages, as provided in MISS. CODE. ANN. § 97-23-29 (1972)).

MISS. CODE ANN. § 89-7-25 (1972) provides:

> When a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by notice, . . . he shall . . . thenceforward pay to the landlord double the rent which he should otherwise have paid . . .; and double rent shall continue to be paid during all the time the tenant shall so continue in posssession.

Id.

[97] *See* 320 So. 2d at 778.

III. Injuries Falsehood—Disparagement Including Slander of Title and Trade Libel

If the plaintiff's economic expectancies are interfered with by means of false statements disparaging his rights in or the quality of his property, the appropriate tort label is, under the *Restatement,* injurious falsehood.[98] Although the *Restatement* rule is designed to cover all publications of false statements that harm plaintiff's pecuniary interests,[99] the Mississippi cases focus upon slander of title.[100] By examining these cases, the general rules of liability arising in this factual context may be discovered.

The leading Mississippi case sets forth the general rule of liability for slander of title. In *Walley v. Hunt,*[101] the court summarized the elements of the cause of action as follows: "One who falsely and maliciously publishes matter which brings in question or disparages the title to property, thereby causing special damage to the owner, may be held liable in a civil action for damages."[102] Thus, plaintiff's case depends upon proof of defendant's 1) publication of 2) a false statement 3) with malice 4) disparaging plaintiff's title to property 5) with resulting special damages. Before considering the more troublesome elements, a brief explanation of publication, falsity, and disparagement is in order.

Publication requires communication by the defendant of an injurious falsehood to a third party.[103] Perhaps the most common form of publication in cases of slander of title is filing for record an instrument disparaging plaintiff's title to property.[104] Of course, to be actionable, the matter communicated must be

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[98] *See* Restatement (Second) of Torts § 623A, Comment a (1977).

[99] *Id.*

[100] Slander of title is now usually called disparagement of title. Lundstrom v. Thorpe, 189 F.2d 46, 51 (8th Cir.), *cert. denied,* 342 U.S. 819 (1951).

[101] 212 Miss. 294, 54 So. 2d 393 (1951).

[102] *Id.* at 304, 54 So. 2d at 396 (quoting 33 Am. Jur. *Libel and Slander* § 346 (1941)).

[103] Restatement (Second) of Torts § 630 (1977).

[104] *See id.* § 630, Comment b; *see also*:

> Liability for slander of title may also be predicated on the filing and recording of a false instrument purporting to affect the title to property, or on the execution, wilful acceptance, and malicious recordation of a deed which falsely declares the title of the property involved to be in a person other than the true owner.

Walley v. Hunt, 212 Miss. 294, 305, 54 So. 2d 393, 396 (1951).

false.[105] If one does in fact have a valid claim to the plaintiff's property, the publication of that claim does not give rise to liability. In addition, the false communication must disparage the plaintiff's title or interest in property:

> A statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and
>
> (a) the publisher intends the statement to cast the doubt, or
>
> (b) the recipient's understanding of it as casting the doubt was reasonable.[106]

In sum, the defendant must communicate to a person other than the plaintiff a false statement which casts doubt upon the plaintiff's title before malice and special damages become important considerations.

As in the case of interference with prospective or existing contracts, malice, although easy to announce as an essential element[107] of injurious falsehood, is difficult to apply. In this context malice may mean several things: 1) the presence of ill-will (spiteful motive); 2) scienter (knowledge of falsity or acting in reckless disregard of truth or falsity); 3) the absence of privilege (usually negated by the presence of scienter or ill-will if the privilege is conditional).[108] The convergence of all three of these meanings in the single label makes analysis of the decisions difficult.

In *Phelps v. Clinkscales,*[109] the Mississippi Supreme Court, after citing *Walley v. Hunt* for the proposition "that the malicious filing for record of an instrument which is known to be inoperative, and which disparages title to land, is a false and malicious statement for which damages may be recovered . . . ."[110] held that the chancellor was authorized "to infer mal-

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[105] RESTATEMENT (SECOND) OF TORTS § 634 (1977).

[106] *Id.* § 629.

[107] The principal element in slander is malice. Frankfort Oil Co. v. Snakard, 279 F.2d 436 (10th Cir. 1960), *cert. denied,* 364 U.S. 920 (1961).

[108] *See* RESTATEMENT (SECOND) OF TORTS § 623A, Comment d (1977).

[109] 247 So. 2d 819 (Miss. 1971).

[110] *Id.* at 821.

ice" under the facts of this case.[111] These facts included the defendant's execution and filing for record of a quitclaim deed to his minor son which purported to convey complainants' lands. The property had been previously partitioned with the defendant having joined in the prayer for that decree. In its finding of malice, the court stated, "Malice exists in the mind and usually is not susceptible of direct proof. The law determines malice by external standards; a process of drawing inferences by applying common knowledge and human experience to a person's statements, acts, and the surrounding circumstances."[112] The problem with this statement is its failure to distinguish between "ill-will" malice and "scienter" malice. The former is not essential to the affirmative cause of action; but the latter is, both traditionally and in light of recent constitutional decisions concerning defamation.[113]

While it is true that the presence of ill-will may negate privilege,[114] the absence of scienter is fatal to a plaintiff's case since the tort in question is an intentional one. Only if the defendant intentionally lies may he be held liable. His intent depends upon his knowledge of the falsity of the statement or his acting in reckless disregard of its truth or falsity. Consequently, "scienter," as used in the context of intentional misrepresentation,[115] provides a more suitable term than "malice" for describing the defendant's state of mind. Absence of scienter should result in judgment for the defendant; but the presence of ill-will, when scienter is present, should affect the applicability of certain privileges.

The question of privilege has been considered in several cases construing Mississippi law. In *Smith County Oil Co. v.*

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[111] *Id.*; *see, e.g.*, Gates v. Utsey, 177 So. 2d 486, 487 (Fla. 1965) (defendant refused to remove a forged warranty deed from the records after learning of the forgery; this constituted malice).

[112] 247 So. 2d at 821.

[113] *See*, Wade, *supra* note 25, at 684, 704.

[114] *See* Gates v. Utsey, 177 So. 2d 486, 488-89 (Fla. 1965) (malice here means lack of justification; actual malice is important only to defeat the defense of a privilege or to enhance damages).

[115] In this context, intentional misrepresentation can be viewed as the equivalent of deceit.

Jefcoat,[116] the Mississippi Supreme Court held that the plaintiffs, owners of mineral rights, should not be awarded damages because the defendant's claim to these rights was not asserted "without probable cause, or with a willful or malicious purpose to injure and damage the [plaintiffs] since the evidence does not sustain the theory of fraud or show any malice . . . ."[117] The privilege which was applied and found not to be exceeded or abused is the conditional privilege of a rival claimant: "A rival claimant is conditionally privileged to disparage another's property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself."[118] If the defendant believes his claim to the plaintiff's property is justified, *i.e.*, if he acts in good faith, then his assertion of what turns out to be a false statement is not actionable.

The federal courts have found for the defendant apparently on the basis of this privilege. In *Sellars v. Grant,*[119] the court held that the defendant was not actuated by malice in keeping a lis pendens notice of record after the facts involved in the dispute to title were explained to him and his attorney by the plaintiff and his attorney since the case presented a close question and sworn testimony was needed to resolve the factual problem presented.[120] Similarly, in *Reynolds v. Maples,*[121] the court found for the defendants since the record showed without dispute that they had acted in good faith and upon advice of able counsel in asserting their claim to the disputed title even though the claim was ultimately found to be invalid.

The rival claimant's privilege, like other conditional privileges,[122] may be abused, and, unfortunately, the method of abuse may involve both kinds of malice. Even in the cases discussed

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[116] 203 Miss. 404, 33 So. 2d 629 (1948).

[117] *Id.* at 415, 33 So. 2d at 633. *See* Perrien v. Mapp, 374 So.2d 794, 798 (Miss. 1979) (no damages allowed against defendant in suit for slander of title where defendant's claim was the result of a bona fide belief and no malice was present, even though his claim was ultimately defeated).

[118] RESTATEMENT (SECOND) OF TORTS § 647 (1977).

[119] 196 F.2d 677 (5th Cir. 1952).

[120] *Id.* at 680.

[121] 214 F.2d 395 (5th Cir. 1954).

[122] *See* RESTATEMENT (SECOND) OF TORTS §§ 646A (the rules on conditional privileges to publish defamatory matter are applicable to the publication of injurious falsehood), 649 (conditional privilege of competitors) (1977).

above, the courts do not analyze the problem first in terms of malice and then in terms of abuse of privilege. Although this practice is probably impossible to avoid because of the relationship of malice to both the affirmative and negative sides of the action, an attorney should be aware of this relationship. The above discussion is designed to point out the problem rather than to solve it.

Another troublesome element of injurious falsehood is the requirement that special damages *(i.e.,* as a rule, pecuniary damages) be pleaded and proved with specificity. Thus, the cause of action requires proof of proximately resulting pecuniary loss. Unfortunately, the court in *Walley v. Hunt*[123] failed to realize that the plaintiff's cause of action did not arise until the element of special damages occurred. As a result, the plaintiff's action for slander of title was held to be barred by the statute of limitations since the execution and filing for record of the disparaging mineral deeds occurred more than one year before the suit was brought but within one year after a potential purchaser of the plaintiff's interest discovered the disparaging record. The court rejected the plaintiff's argument that the cause of action "accrued and the statute of limitations began to run only from the date when the false statement concerning the complainant's title was communicated to a prospective purchaser . . . ."[124] Rather, the court ruled that the statute began to run at the time of execution and filing for record of the mineral deeds. It is submitted that both the plaintiff and the court were incorrect since the plaintiff could not state a cause of action until special damages resulted from the injurious falsehood.[125] The court was correct in recognizing that 1) malice, 2) falsity, 3) disparagement, and 4) publication all existed at the time of filing, but the decision leaves out the fifth requirement for the cause of action[126]—resulting special damages. Only when the plaintiff was thwarted in his attempted sale or when he otherwise experienced

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[123] 212 Miss. 294, 54 So. 2d 393 (1951).

[124] *Id.* at 308, 54 So. 2d at 398.

[125] *See, e.g.,* Lundstrom v. Thorpe, 189 F.2d 46, 51 (8th Cir.) (the cause of action is not for the spoken words or committed act but rather for the special damages incurred), *cert. denied,* 342 U.S. 819 (1951).

[126] See note 102 and accompanying text *supra.*

pecuniary losses did he suffer the special damages required, not only for relief, but for the substantive cause of action itself. It must be admitted that the plaintiff could have recovered for the tort upon the filing of the deeds if he had brought a suit to remove the cloud and incurred attorney's fees or other costs in doing so. In the instant case no such loss had occurred and the special damages requirement had not been met until the attempted sale failed to transpire.

The *Restatement* rule concerning causation of pecuniary loss is clearly broader than the causation test applied by Mississippi courts in cases of interference with prospective and existing contracts. Rather than the "but for"[127] test, the *Restatement* employs the "substantial factor" test:

> The publication of an injurious falsehood is the legal cause of pecuniary loss if
>
> (a) it is a substantial factor in bringing about the loss, and
>
> (b) there is no rule of law relieving the publisher from liability because of the manner in which the publication has resulted in the loss.[128]

The *Restatement* rule regarding proof of special damages[129] is in line with the more recent decisions across the country, but it is more liberal than the traditional rule.[130] Thus, the pecuniary loss may be established by "(a) proof of the conduct of specific persons, or (b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify."[131] The nature of the pecuniary loss under the *Restatement* and under the Mississippi decisions is similar. It includes impairment of vendibility and expenses to counteract the publication.[132] The latter

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[127] See notes 55 and 88 and accompanying text *supra.*

[128] RESTATEMENT (SECOND) OF TORTS § 632 (1977).

[129] *Id.* § 633.

[130] The traditional rule requires plaintiff to specify particular customers who because of the injurious falsehood did not deal with him in particular transactions. *See, e.g.,* Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68 (1886). The more liberal *Restatement* rule allows pecuniary loss to be established by "proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify." RESTATEMENT (SECOND) OF TORTS § 633(2)(b) and Comment h (1977).

[131] RESTATEMENT (SECOND) OF TORTS § 633(2)(a)-(b) (1977).

[132] *Id.* § 633(1)(a)-(b). *See also* Glusman v. Liberman, 285 So. 2d 29, 31 (Fla. App.

arises most often in cases of slander of title as litigation expenditures necessary to remove the doubt cast upon the plaintiff's title. For example, in *Phelps v. Clinkscales,*[133] an award of $1,500 in damages was justified by evidence of $1,400 in attorney's fees incurred in the suit to remove the cloud.[134]

In conclusion, when the intentional interference with the plaintiff's economic expectancy is brought about by means of the defendant's deceit practiced upon a third party who refrains from dealing with the plaintiff as a result, the broader categories of interference with prospective and existing contracts previously discussed are generally ignored by the courts. As a result, the particular elements of an action for injurious falsehood must be proved when that label applies.

IV. Palming Off—Unfair Competiton and Trade Names

Like disparagement, the common law tort label of "palming off" (or "passing off") describes another means of interference with the plaintiff's economic expectancies. The method used by the defendant in this situation involves imitation of the plaintiff's goods or name in such a way as to confuse potential customers into believing the product or services offered by the defendant originated with the plaintiff. Its similarity to injurious falsehood is apparent since a kind of "deceit" is practiced upon third persons to divert their trade from the wronged competitor to the rival wrongdoer. But special rules not always consistent with those for injurious falsehood apply in cases of palming off. These rules have particularized application in the law of trade names—the common law counterpart to the chiefly statutory law of trademark.[135] And while the label "unfair competition" has

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1973) (where defendant filed false instrument asserting ownership of plaintiff's property, plaintiff was entitled to punitive as well as compensatory damages).

[133] 247 So. 2d 819 (Miss. 1971).

[134] *Id.* at 821; *accord,* Glusman v. Liberman, 285 So. 2d at 31-32 (attorney's fees were allowed in a slander of title action).

[135] Of course, trademarks are subject to both common law and statutory protection. Since the non-statutory protection of trademark is the same as that for trade name, the discussion in this part of the article actually covers both subjects. Trademarks registered under state or federal statutes are beyond the scope of this discussion; however, the rules in both bodies of law often overlap. For the state statutory law, see Miss. Code Ann. §§ 73-25-1 to 75-25-27 (1972). For the federal statute, see 15 U.S.C. §§ 1051-1127 (1976).

been applied to other types of interference with economic expectancies, it is most appropriately equated with palming off. By examining Mississippi decisions involving the wrongful use of trade names, this article will delineate the special rules that govern the tortious interference under discussion.

The broad principle of liability for palming off as applied to trade names may be stated as follows: one who has acquired the right to the exclusive use of a trade name may obtain relief for its use by a competitor if such use is likely to result in confusion of source.[136] The rule is composed of four elements: 1) right to use, 2) use by a competitor, 3) likelihood of confusion, and 4) relief. Each of these elements will be analyzed in the following examination of relevant Mississippi cases.

The plaintiff's right to use a trade name must be established before the defendant is liable for its use or for the use of a similar name. As the Mississippi Supreme Court reasoned in *Dollar Department Stores of Mississippi v. Laub,* the definition of trade name focuses upon both the means of acquiring rights in it and the function a protectible name must serve:

> A trade name is any designation which (a) is adopted and used by a person to denominate goods which he markets or services which he renders or a business which he conducts, or has come to be so used by others, and (b) through its association with such goods, services or business, has acquired a special significance as the name thereof, and (c) the use of which for purposes stated in Clause (a) is prohibited neither by a legislative enactment nor by an otherwise defined public policy.[137]

Thus, a protectible name must be used to denominate goods or services and must have acquired a special significance in connection with such goods or services. Special significance or secondary meaning will be discussed after an examination of prior use.

A person generally acquires the right to use a trade name by using it first. In *McGehee v. O K Storage and Transfer Co.,*[138]

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[136] *See* Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 611 (7th Cir. 1965) (the test is likelihood of confusion, not actual confusion).

[137] Dollar Dep't Stores of Miss., Inc. v. Laub, 238 Miss. 708, 714, 120 So. 2d 139, 141 (1960) (quoting RESTATEMENT OF TORTS § 716 (1938) which has been omitted from RESTATEMENT (SECOND); see note 3 *supra).*

[138] 330 F.2d 703 (5th Cir. 1964).

the court was required to determine whether the plaintiff was the senior user of the "O K" name. Focusing upon actual first use, the appellate court sustained the trial court's determination that the plaintiff was the senior user of the name in spite of the defendant's having previously listed his telephone number under the same name. The court reasoned that the defendant's use of several names other than "O K" (which it used initially only in the telephone directory) and its having begun the use of "O K" in other ways only after the plaintiff's use made the defendant "nothing more than a telephone book company."[139] In short, the defendant's "use" in the telephone book did not constitute a prior use for the purpose of denominating his services.[140]

A different case was presented to the Mississippi Supreme Court in *Meridian Yellow Cab Co. v. City Yellow Cabs*[141] because of the application of the Mississippi corporate name statute.[142] Although the defendant began to use the "Yellow Cab" name two months before the plaintiff, apparently prior actual use was not essential to the plaintiff's case. The statutory prohibition against "the creation of a corporation in this state 'with the name of any existing corporation of this state . . . ' "[143] or with a similar name which is misleading justified the injunction sought by the plaintiff.[144] Apparently, prior registration of the corporate name either substituted for or satisfied the requirement of prior actual use.

Perhaps the most often litigated issue concerning an exclusive right to use a trade name involves the so-called "secondary meaning" question. This issue usually arises in connection with generic names. The general rule that one may not acquire an exclusive right to use a generic name or a merely descriptive name is, nevertheless, subject to an often consuming exception if the development of a secondary meaning can be established: "A generic word or term may . . . by usage, acquire a secondary, spe-

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[139] *Id.* at 703.

[140] *Id.* at 703-04.

[141] 206 Miss. 812, 41 So. 2d 14 (1949).

[142] See note 143 and accompanying text *infra.*

[143] *Id.* at 829, 41 So. 2d at 18 (quoting MISS. CODE ANN. § 5322 (1942) (current version at MISS. CODE ANN. § 79-11-7 (1972)).

[144] 206 Miss. at 829-30, 41 So. 2d at 18.

cial or trade meaning as indicating the goods or business of a particular person, so as to entitle him to protection against any unfair or piratical use or simulation thereof by another."[145] Applying this exception, the Mississippi Supreme Court ruled that "Dollar" as used in "The Dollar Store" had acquired a secondary meaning and affirmed an injunction against a defendant's use of a similar name.[146] A similar case, "controlled in all essential aspects" by *The Dollar Department Store* decision is *Staple Cotton Cooperative Association v. Federal Staple Cotton Co-op Association.*[147] But in *Dixie Oil Co. v. Picayune "66" Oil Co.,*[148] the Mississippi Supreme Court agreed with the chancellor's decision that the name " 'Dixie Gas' has not acquired a secondary meaning of appellant's gas only, and had not thus become the exclusive property of appellant."[149] Appellant argued that the words, "Another Load of Dixie Gas," displayed on its trucks and promotional stickers, "I Use Dixie Gas," displayed on numerous automobiles, established a secondary meaning. The court announced the appropriate test: " 'In short, the test of secondary meaning is whether the mark has become broadly known throughout the public as denoting a product of certain origin.' "[150] The court then ruled that the facts did not satisfy the announced requirement.[151]

As in the case of generic or merely descriptive names, a person ordinarily does not have an exclusive right to use a personal name, at least as against another with the same name. However, if confusion results with the name of a prior user, one may be precluded from use of his own name. Thus, in *Cockrell v. Davis,*[152] Jimmie Davis, "singing governor" of Louisiana, was

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[145] 238 Miss. at 715, 120 So. 2d at 142 (quoting 52 AM. JUR. *Trademark, Tradenames, and Trade Practices* § 55 (1944)). The quoted statement is still applicable today, see 74 AM. JUR. 2d *Trademarks and Tradenames* § 48 (1974).

[146] The court thought the plaintiff's continuous use of the name since 1932 was conclusive in spite of defendant's having chartered a corporation under a similar name in 1957 but prior to its infringing use in 1958. 238 Miss. at 717-18, 120 So. 2d at 143.

[147] 249 Miss. 465, 162 So. 2d 867 (1964); *accord,* Richardson v. Thomas, 257 So. 2d 877 (Miss. 1972).

[148] 245 So. 2d 839 (Miss. 1971).

[149] *Id.* at 842.

[150] *Id.* (quoting 150 A.L.R. 1056, 1079 (1944)).

[151] 245 So. 2d at 842.

[152] 198 Miss. 660, 23 So. 2d 256 (1945).

granted an injunction against Jimmie Davis Cockrell, a swing band leader, restraining him from using the name "Jimmie Davis" in connection with musical or other performances.[153] Since the name had developed a secondary meaning in connection with the prior user, the defendant's argument that it was his given name was not persuasive.[154]

Even if the plaintiff is a prior user of a trade name with a secondary meaning, he may lose his right to use it or he may transfer that right to another. If he abandons the name, a subsequent user may acquire a right to its exclusive use. Two cases are illustrative. In *Yellow Cab Co. v. Checker Taxicab Owner's Association,*[155] the defendant used the name "Checker Cab" until 1953, when its use of the name ceased except as a telephone listing.[156] The plaintiff began use of the same name in 1956.[157] The Mississippi Supreme Court sustained the chancellor's finding of abandonment based on the defendant's non-use for a period of more than two years prior to the plaintiff's appropriation.[158] An opposite result, however, was reached in *Cotton's Holsum Bakers, Inc. v. Smith Bakery, Inc.*[159] Defendant's argument that plaintiff's use of "Holsum" was not sufficient to prevent an abandonment was rejected by the court in ruling that the chancellor was justified in finding that the plaintiff, a prior user in the area in question, had continuously used "Holsum" in connection with its bakery business.[160]

Although a trade name may be assigned and the assignee acquire the same right to use the name as the original user, the assignment is invalid if "in gross." Therefore, an assignment of a name without an accompanying transfer of the good will associated with the name is invalid. This principle was at least impliedly recognized in *Daumit Stores, Inc. v. Brown,*[161] where the plaintiff's acquisition of the "Kaybee" name for no consideration and the defendant's prior purchase of the Kaybee sign, as well as the fixtures of the business, were facts relied upon by the court

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[153] *Id.* at 669, 23 So. 2d at 259.

[154] *Id.* at 676, 23 So. 2d at 262.

[155] 233 Miss. 735, 103 So. 2d 350 (1958).

[156] *Id.* at 736, 103 So. 2d at 351.

[157] *Id.* at 737, 103 So. 2d at 351.

[158] *Id.* at 740, 103 So. 2d at 353.

[159] 241 Miss. 317, 130 So. 2d 570 (1961) (deciding a trademark case on common law grounds).

[160] *Id.* at 323-24, 130 So. 2d at 570.

[161] 249 Miss. 528, 163 So. 2d 466 (1964).

in denying injunctive relief.[162]

Even if the plaintiff establishes his right to use a trade name, he must still prove "unfair competition"[163] to obtain relief. Thus, he must show that the defendant's use of the same or a similar name will result in at least a likelihood of confusion on the part of potential customers. His task requires, as a rule, proof of the defendant's use of the name in a similar business in a similar geographical area, since confusion would not otherwise be likely to result.

However, the requirement of competition between the plaintiff and the defendant should not be read too narrowly.[164] Thus, in *Cockrell v. Davis,*[165] the court was not persuaded by the defendant's argument that the absence of direct competition was fatal to the plaintiff's case.[166] Rather, the court looked to the likelihood of confusion in quoting from an annotation on the subject:

> [T]he doctrine of unfair competition is not confined to cases of actual market competition between identical or similar products of the parties, but extends to all cases in which the use by a junior appropriator of a trade mark or trade name leads to a confusion of source, as where the infringer fraudulently seeks to sell his goods as those of the complaining party, or creates the belief in the public mind that . . . the infringer's . . . wares are those of the mark owner, or where prospective purchasers would be misled into thinking that the complaining party has extended his business into the field.[167]

The fact that the defendant's band was an orchestra of adept musicians playing dance music and that the plaintiff's music and musicians were "Hill Billy" did not, therefore, negate the likelihood of confusion.

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[162] *Id.* at 536-37, 163 So. 2d at 470.

[163] Hanover Milling Co. v. Metcalf, 240 U.S. 403, 423-24 (1915) (it was unfair competition for defendant to package and name flour so as to deceive customers into thinking it was plaintiff's flour; it indicates a fraudulent intent "to palm off").

[164] *See* Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 612 (7th Cir. 1965) (where defendant adopted the same name for its Chicago motel as the plaintiff's hotel in Miami Beach, there was no question of direct competition but there was a chance that the plaintiff's reputation would suffer).

[165] 198 Miss. 660, 23 So. 2d 256 (1945).

[166] *Id.* at 668-69, 23 So. 2d at 259.

[167] *Id.* at 675, 23 So. 2d at 261-62 (quoting 148 A.L.R. 53 (1944)); *accord,* Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609 (7th Cir. 1965).

Competition in a given geographical area is generally required. The Mississippi Supreme Court decision in favor of the defendant in *McKay v. Legler*[168] is illustrative. The plaintiff, owner of the "Old Southern Tea Room" located in Vicksburg, sought to enjoin the defendant's use of the trade name, "Jackson Olde Southern Tea Room." Although both businesses were restaurants and as a result arguably competitors, the distance between Jackson and Vicksburg was sufficient to distinguish the instant case from *Cockrell v. Davis.*[169] Since the restaurants attracted different customers from different geographical areas, confusion of source was deemed unlikely.[170]

Before considering the relief available in a palming off case, it is important to note that the intent requirement in these cases is not the intent to divert customers or make a false statement. Rather, the defendant's act is deemed to be constructively fraudulent and, therefore, actionable if his use of a similar name results in confusion.[171] The prerequisites to relief, therefore, are the plaintiff's right to exclusive use of a trade name which is used by a "competitor" with a resulting likelihood of confusion of source by potential customers.

Three remedies are avilable: 1) damages, 2) injunction,[172] and 3) restitution. The Mississippi Supreme Court focused upon the issue of relief in *Richardson v. Thomas.*[173] After deciding that the plaintiff had established his right to have his trade name protected from encroachment, the court ruled that the chancel-

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[168] 36 So. 2d 793 (Miss. 1948).

[169] *Id.* at 794 (that Davis' record sales and radio broadcasts reached Jackson satisfied the "geographical competition" requirement).

[170] *Id.*

[171] "If the use of similar names results in confusion or unfair competition, the use is constructively fraudulent even though the act may be done innocently." Dollar Dep't Stores of Miss., Inc. v. Laub, 238 Miss. 708, 717, 120 So. 2d 139, 143 (1960) (citing Cockrell v. Davis, 198 Miss. 660, 23 So. 2d 256 (1945) and Meridian Yellow Cabs Co. v. City Yellow Cabs, 206 Miss. 812, 41 So. 2d 14 (1949)); *accord,* Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 613 (7th Cir. 1965) (a finding of fraudulent intent or bad faith isn't essential if there is likelihood of confusion); Richardson v. Thomas, 257 So. 2d 877, 880 (Miss. 1972) (quoting *Dollar Dep't Stores*).

[172] *See* Hanover Milling Co. v. Metcalf, 240 U.S. 403, 424 (1915) (injunction granted); Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 613 (7th Cir. 1965) (same).

[173] 257 So. 2d 877 (Miss. 1972).

lor's injunction was proper and that the defendant had failed to comply with it.[174] The chancellor had enjoined the defendant from advertising or doing business under the name "Ham House" or a colorable imitation of that name " 'so as to palm off the goods of defendant as those of Complainant. . . .' "[175] The defendant had responded by changing the trade name to "Jack's Country Hams," using signs similar to the plaintiff's, and continuing to use "Jack's Hamhouse" in the telephone directory.[176] The court thought the decree was fair and the additional requirement of paying a fine of $250.00 to have a jail sentence for contempt suspended was in order. The award of damages was also sustained. Thus, the award of $3,500 in actual damages representing profits lost by the plaintiff because of the defendant's unfair competition, $1,000 for impairment of goodwill, and $500 in general damages for inconvenience and annoyance was affirmed.[177] The court also suggested that restitution for unjust enrichment could have been allowed as an alternative to damages: "The plaintiff, appellee, was entitled to his actual profits made by the appellant as a result of the illegal use of the trade name previously used by the appellee or he was entitled to his loss of sales resulting from the illegal trade practice on the part of appellant."[178] Of course, since the plaintiff sought damages in lieu of restitution,[179] the latter remedy was not discussed.

In summary, the use of a confusingly similar trade name is a means of interference with the plaintiff's economic expectancies which is actionable if the particular elements of this tort are proved. The basis for the action is palming off goods or services of the defendant as those of or originating with the plaintiff. The trade name cases are, therefore, illustrative of the tort of palming off or unfair competition for which the full panoply of remedies is available.

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[174] *Id.* at 880.

[175] *Id.*

[176] *Id.*

[177] Although plaintiff sought twenty percent of the $35,000 gross decline in his business, the court thought that only ten per cent of the gross decline was caused by the infringing use and that the additional decline was the result of defendant's fairly selling a competing product. *Id.* at 881.

[178] *Id.*

[179] Restitution to prevent unjust enrichment is distinguished from damages in that the measure of recovery for the former is defendant's gained profits and for the latter is plaintiff's lost profits. *See* D. DOBBS, HANDBOOK ON LAW OF REMEDIES 224 (1973).

V. Trade Secrets

The label "trade secrets" is applied to the final pattern of interference with economic expectancies to be considered. This tort involves the use of improper means to acquire a rival's business secrets[180] and thereby to appropriate the plaintiff's potential customers. Except for purposes of calculating damages, the tort in question does not require proof of actual diversion of specific customers. Rather, the focus is upon two questions: 1) did the defendant acquire the plaintiff's trade secret? 2) did the defendant use improper means to do so? Analysis of one case arising in Mississippi will provide sufficient illustration.

In *Cataphote Corp. v. Hudson,*[181] the Fifth Circuit Court of Appeals stated the questions presented in a trade secret case in terms of the facts before it: "(1) whether Cataphote's claims were in fact trade secrets[182] and (2) if they were, whether Hudson and Hudson Industries, Inc. illegally appropriated them."[183] The act complained of was a former employee's use in a competing business[184] of certain processes for the manufacture of glass beads. Thus, the trade secrets were argued to be the manufacturing processes and the improper acquisition to be by means of a breach of a confidential relationship. The earlier opinion in the same case had defined trade secret: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportu-

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[180] If the trade secret is discovered by fair and honest means, as opposed to improper means, there is no protection or remedy available. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974); Junker v. Plummer, 320 Mass. 76, 67 N.E.2d 667, 670 (1946).

[181] 444 F.2d 1313 (5th Cir. 1971), *aff'g* 316 F. Supp. 1122 (S.D. Miss. 1970).

[182] The factors used in considering whether something is a trade secret are as follows:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be acquired or duplicated by others.

Space Aero Products Co. v. R.E. Darling Co., 238 Md. 93, 208 A.2d 74, 82, *rehearing denied,* 238 Md. 129, 208 A.2d 699 (1965), *cert. denied,* 382 U.S. 843 (1966) (quoting Restatement of Torts § 757B (1938)).

[183] 444 F.2d at 1314.

[184] *Id.* at 1316 (noting that the absence of a covenant not to compete, such agreement being apparently not favored under Mississippi law, made unnecessary consideration of the effect of such a contract in the instant case).

nity to obtain an advantage over competitors who do not know or use it."[185] The court also analyzed the novelty required for the information to be considered "secret." Recognizing that information of public or general knowledge in an industry is not secret, the court thought novelty, in the sense of a substantial advance over prior knowledge, was not essential for trade secret protection.[186] Thus, for trade secret protection, the information used in a plaintiff's business must be novel enough to be secret[187] but not otherwise unique. The processes involved in the instant case were ultimately found not to be secret under the above analysis. The court, therefore, was not required to address the second question: improper acquisition. Nevertheless, the decisions do provide guidelines for determining this issue in cases of former employees: "An employee, upon the termination of his employment is free to draw upon his general knowledge, experience, memory and skill, howsoever gained, provided he does not use, disclose or impinge upon any of the secret processes or business secrets of his former employer."[188] Apparently, the defendant in the instant case had used his general knowledge rather than special information acquired from his former employers in developing a furnace for the manufacture of glass beads.

Of course, other improper means of acquiring a trade secret may give rise to liability.[189] A few additional cases arising in Mis-

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[185] 422 F.2d 1290, 1293 (5th Cir. 1970) (quoting RESTATEMENT OF TORTS § 757, Comment b (1939)); *accord,* Space Aero Products Co. v. R.E. Darling Co., 238 Md. 93, 208 A.2d 74, 79 (1965).

[186] 422 F.2d at 1294 (distinguishing between patent protection requiring "novelty" and trade secret protection on the basis of the non-monopolistic rights of the latter); *accord,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974) (novelty, in the patent law sense, is not required for a trade secret but the information can't be generally known).

[187] Absolute secrecy is not required but some secrecy must exist. Space Aero Products Co. v. R.E. Darling Co., 238 Md. 93, 208 A.2d at 82.

[188] 422 F.2d at 1295 (quoting R. CALLMANN, 2 UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 54.2 at 416-17) (3d ed. 1968); *accord,* Junker v. Plummer, 320 Mass. 76, 67 N.E.2d 667, 669 (1946) (an employee may carry away and use general knowledge and skill but he can't use confidential information gotten during his course of employment).

[189] For an interesting case of industrial espionage in which aerial photographs of a plant under construction were viewed as an improper means of acquiring a trade secret, see E.I. duPont deNemours & Co., Inc. v. Christopher, 431 F.2d 1012 (5th Cir. 1970), *cert. denied,* 400 U.S. 1024, *rehearing denied,* 401 U.S. 967 (1971).

sissippi have treated this problem.[190] The *Cataphote* decisions, however, focus correctly and, for purposes of this article, adequately upon the essential elements of this tort. The plaintiff's trade secret is protected, but only against improper acquisition.

CONCLUSION

Although no single tort formulation applies to actions for intentional interference with economic expectancies at common law, the labels considered in this article name specific torts to be utilized in obtaining relief for the interference in question.[191] Thus, an attorney who believes his client's competitor is unfairly injuring the former's opportunity to sell property or services should begin by seeking the tort label most appropriate to the particular factual situation. In doing so, he will discover that certain patterns of interference have been recognized as actionable by the courts if the applicable elements are proved. Slight variations in the facts, including especially the means used to bring about the interference, make recovery under a particular formula possible.

The identification of the formulations and an analysis of their elements as occurring in cases involving Mississippi nonstatutory law have been attempted in this article. Of course, the success of this effort depends upon further identification and analysis by lawyers and courts in this state who are involved in resolving disputes over intentional interference with economic expectancies.

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[190] *See* Lear Siegler, Inc. v. Ark-Ell Springs, Inc., 569 F.2d 286 (5th Cir. 1978); P.P. Williams Co. v. Colorado Milling & Elevator Co., 246 F.2d 240 (5th Cir. 1957); Mitchell v. Atlas Roofing Mfg. Co., 246 Miss. 280, 149 So. 2d 298 (1963).

[191] One notable label not considered here is "misappropriation." For a general discussion, see Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595 (1942); Sell, *The Doctrine of Misappropriation in Unfair Competition: The Associated Press Doctrine After Forty Years*, 11 VAND. L. REV. 484 (1958).

The Change or Mistake Rule: A Question of Flexibility

*James W. Gladden, Jr.**

The "change or mistake" rule is utilized by courts[1] in several states[2] as a standard for review of amendments to zoning ordinances. According to the rule, a zoning amendment that alters the classification of property will not be sustained unless there is a finding of a substantial change in the character of the neighborhood since the original enactment or a finding of a mistake in the drafting of the original[3] ordinance.[4] The rule, as developed by the Maryland courts and applied by the Mississippi Supreme Court, is the subject of this Article. This analysis is predicated specifically on the tenet that proper land use and development require a planning process[5] that is responsive to the

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[1] The rule is of judicial adoption although Maryland has now codified its provisions. MD. ANN. CODE art. 66B, § 4.05(a) (1957). Since one effect of the rule is to shackle legislative prerogative, see notes 212 through 214 and accompanying text *infra*, the absence of statutory response in other states is curious. The best explanation would appear to lie in the almost complete removal of zoning responsibilities to the local government level. See note 33 and accompanying text *infra*. However, in all states where the rule obtains it is not unusual for local ordinances to specify change or mistake determination in amendment procedure. *See, e.g.*, OXFORD MISS., Code § 711.01 (1968) (ordinance not to be amended except where manifest error needs correction or changed conditions require a rezoning).

[2] See note 57 and accompanying text *infra*.

[3] The term "original" will be employed in this article to describe the ordinance being amended. It should be noted, however, the ordinance being amended may itself be the result of a prior amendment and thus in this sense not be truly original.

[4] Board of County Commissioners v. Edmonds, 240 Md. 680, 215 A.2d 209, 213 (1965); Board of Supervisors v. Roberts, 287 So. 2d 436, 437 (Miss. 1973). *See* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 5.07, at 274 (2d ed. 1976); 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 27.03[1], at 27-29 (4th ed. 1978).

[5] Planning is concerned with the physical layout of the community and related economic and social factors. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 1.01 (1974). While planning encompasses zoning, the reverse is not necessarily true. Zoning divides into districts for particular uses while planning also encompasses proposals and plans for public improvements and services in the future. 1 P. ROHAN, ZONING AND LAND USE CON-

intricate interrelationships among the variables of social, economic, and physical change in the community.[6] As will be shown, the change or mistake rule has inadequately fulfilled this need for flexibility and its use as a standard of review by the courts of Mississippi should be reconsidered.

Several objectives are pursued in the course of this Article. First, an overview of the origin and implementation of the change or mistake rule in Maryland and Mississippi will be presented. Secondly, particular emphasis will be given to divergence in the respective policies of the states regarding application of the rule.[7] Thirdly, and foremost, potentially negative developments in land use planning and regulation resulting from continued use of the rule in Mississippi will be explored.

I. Origins of the Rule

In 1926 the Supreme Court upheld the constitutionality of comprehensive zoning[8] in *Village of Euclid v. Ambler Realty*

TROLS § 1.02[3] (1978).

[6] It has been argued that the physical planning process must include attempts to forecast economic and social consequences that flow from development patterns. Wheaton, *Operations Research for Metropolitan Planning,* 29 J. AM. INST. PLANNERS 250 (1963). For basic background as to why the planning process needs to include factors other than the physical, see generally Bolan, *Emerging Views of Planning,* 33 J. AM. INST. PLANNERS 233 (1967); Mitchell, *The New Frontier in Metropolitan Planning,* 27 J. AM. INST. PLANNERS 169 (1969); Mocine, *Urban Physical Planning and the "New Planning,"* 32 J. AM. INST. PLANNERS 234 (1966).

[7] Of special note are policies of the states regarding the floating zone, see text beginning at note 172 *infra,* and comprehensive rezonings, see text beginning at note 191 *infra.*

[8] Comprehensive or Euclidean zoning is the geographical division of an entire jurisdiction into several classifications regulating the use and development of land. Within the divisions, the land use regulations apply uniformly. There are three basic categories of zones—residential, commercial, and industrial; and each basic category has subclassifications to allow for gradations in the intensity of development. Restrictions are generally cumulative, with lower use classifications excluding higher uses but higher use classifications not preventing developments of a less intensive nature. Hence, a residential classification excludes industrial use but residential developments are allowable in an industrial zone. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 29, at 68-71 (1971).

Zoning enabling acts typically require that zoning enactments be made in accordance with a comprehensive or well considered plan. *E.g.,* MISS. CODE ANN. § 17-1-9 (1972); *see also* Berry v. Embrey, 238 Miss. 819, 824, 120 So. 2d 165, 168 (1960) (zoning may restrict methods of construction but ordinances must be in accordance with a comprehensive plan). *See generally* Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

Co.[9] Under the cloak of *Euclid*[10] and the equally notable decisions in *Miller v. Schoene*,[11] *Golblatt v. Hempstead*[12] and *Berman v. Parker*,[13] local governments have displayed considerable aggression in their utilization of police and eminent domain powers to control land use and development.[14] Increased use of the police

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[9] 272 U.S. 365 (1926).

[10] In *Euclid* the owner of undeveloped land contended that the city had taken the land by restricting the use of parts of it to non-commercial purposes, thus reducing its value. The Court reasoned that zoning ordinances are a valid exercise of police power and are not to be declared unconstitutional unless found "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395. The comprehensive zoning ordinance was held to be constitutional as a measure reasonably calculated to promote health and safety of the community. *Id.* at 390.

[11] 276 U.S. 272 (1928). The Court sustained a law which required the destruction of ornamental red cedar trees within two miles of apple orchards because the cedars harbored a disease which injured apples. The Court reasoned that since the adjacent uses were irreconcilable, the state would be favoring cedar tree owners over apple tree owners if it did not uphold the law. The destruction of the cedars was held not to be a taking and required no compensation because it was reasonable to prefer the apple industry as a major economic resource of the state. Police power could thus be used to prefer public interest even to the extent of destruction of individual property interest. *Id.* at 279-80.

[12] 369 U.S. 590 (1962). A twenty acre lake with an average depth of 25 feet resulted from Goldblatt's excavation below the water line in sand and gravel mining. At the time of the litigation over 2,000 homes and four public schools were located within a radius of approximately one-half mile around the lake. Because of concern for the safety of children, an ordinance was enacted which forbade further excavation, thus preventing further use of the property for mining operations. The Court invoked the presumption of constitutionality of the zoning ordinance, and concluded that the restriction did not go beyond the reasonable exercise of police power. *Id.* at 592.

[13] In Berman v. Parker, 348 U.S. 26 (1954) the owner of a department store challenged a slum clearance program based on the reasoning that the taking was not for public use since the store was in good condition and thus did not contribute to the area being run down and did not justify destruction. Further, the owner asserted that the authority which would hold title to the land could sell it to a private developer so it was a taking for the benefit of a private owner. In upholding the condemnation, the Court stated that legislative law was "well-nigh conclusive" and that the legislature was the guardian of public need with no exception being made where eminent domain was involved. "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.* at 32. Aesthetic and spiritual values were thereby incorporated within the concept of public welfare and within the power of the legislature. *Id.* at 33. *See also* Village of Belle Terre v. Borras, 416 U.S. 1 (1974). A zoning ordinance prohibiting occupancy in one family dwellings by more than two unrelated persons while permitting occupancy by any number of persons related by blood, adoption or marriage, was found constitutional because of a rational relationship to permissible state objectives of public welfare. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.* at 9.

[14] 1 N. WILLIAMS, *supra* note 5, § 7.05, at 182-84 (noting that the tendency has not

power of zoning has been evident not only in highly urbanized areas,[15] but also in states with a more rural character, such as Mississippi.[16]

Controversy is inevitable, since in serving police power objectives, such as the protection of the public health, safety, and general welfare, zoning regulations confer, at least incidentally, a benefit upon one group and cast a burden upon another.[17] At times, litigants challenge the basic rationale and effectiveness of zoning;[18] far more often, however, disputes arise from allegations of abuse or misuse[19] of the zoning power with reference to a peculiar set of circumstances.[20] Societal needs seemingly press

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been to strictly construe land use restrictions).

[15] *See generally* M. CLAWSON & P. HALL, PLANNING AND URBAN GROWTH: AN ANGLO-AMERICAN COMPARISON (1973); A. SALLION & S. EISNER, THE URBAN PATTERN (2d ed. 1963).

[16] For a good historical summary of zoning in Mississippi see Khayat & Reynolds, *Zoning Law in Mississippi,* 45 MISS. L.J. 365 (1974).

[17] Herbert v. Board of Supervisors, 241 Miss. 223, 232, 130 So. 2d 250, 253 (1961). Such incidental results are not the criteria for testing validity; rather, courts are to consider the health, morals and safety of the community at large. *Id.*

[18] *See* Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule,* 50 KY. L.J. 273, 273 (1962) (concluding that the zoning process is not conducive to producing consistent judgments regarding land use development).

[19] *See* B. SIEGAN, LAND USE WITHOUT ZONING 3 (1972) (prevailing zoning systems are custom designed to frustrate the most noble goals of zoning theory); Comment, *Zoning Morality—An Abuse of the Legislative Grant,* 4 TULSA L.J. 76 (1967) (noting that zoning history reveals the presence of a villain: the overloaded, over worked and over reaching ordinance), (quoting Craig, *Zoning is Not a Cure All: Overworked Zoning and a Remedy,* 6 INST. ON PLAN. & ZONING 163, 165 (1965)). For further discussions of the controversy surrounding zoning and its misuse and abuse, see generally M. BROOKS, EXCLUSIONARY ZONING, Planning Advisory Service Report No. 254 (1970); C. HAAR, LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND (2d ed. 1971); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, AN ANALYSIS OF ZONING REFORMS: MINIMIZING THE INCENTIVE FOR CORRUPTION (1979); J. Reps, *Requiem for Zoning,* 1964 PLAN. 56; Note, *The Constitutionality of Local Zoning,* 79 YALE L.J. 896 (1970); Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 (1971); Note, *Zoning Variances and Exceptions: The Philadelphia Experience,* 103 U. PA. L. REV. 516 (1955).

[20] *See* City of New York v. Jack Parker Assocs., Inc., 5 Misc. 2d 633, 161 N.Y.S.2d 731, 735 (1957) (ordinance may be reasonable under one set of circumstances but unreasonable under another). The rule that each zoning dispute is to be settled upon its own facts is seemingly invariable. *See, e.g.,* Temmink v. Board of Zoning Appeals, 205 Md. 489, 109 A.2d 85, 86-87 (1954) (dispute concerning zoning for shopping center); Palazzola v. City of Gulfport, 211 Miss. 737, 746, 52 So. 2d 611, 613 (1951) (ordinance prohibiting restoration of commercial building in a residential area after over 50% had been destroyed); Jones v. City of Hattiesburg, 207 Miss. 491, 494, 42 So. 2d 717, 718 (1949) (con-

for extensive zoning;[21] and, regardless of whether a given zoning authority shares this view, procedural informalities[22] at the local level abet the expansion of zoning power.

In light of the expanding employment of zoning power, the prime significance of *Euclid* is perhaps the Court's holding that zoning is a legislative act[23] subject to a restricted scope of judicial review. In describing what is essentially a rational relation test, Justice Sutherland wrote: "[I]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[24] That the test constitutes a presumption of validity is beyond dispute.[25] As a legislative act,[26] a zoning ordinance will be upheld if not

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struction of warehouse on railroad right-of-way).

[21] 1 P. ROHAN, *supra* note 5, § 1.01 (1978); 66 KY. L.J. 98, 99 (1977). Few statements of the need for zoning are stronger than that offered in City of Jackson v. McPherson, 162 Miss. 164, 138 So. 2d 604 (1932), where the court found it of supreme importance to state and nation that the home in cities be made secure through modern zoning laws. *Id.* at 174-76, 138 So. 2d at 604-05.

[22] Ultimate determinations in zoning are far too often the result of local political considerations. D. HAGMAN, *supra* note 8, at 72. Broadly drawn procedural requirements in state legislation are customary and conductive to vagary. *See, e.g.*, MISS. CODE ANN. § 17-1-15 (1972) (prescribing public hearing after 15 days notice but furnishing no further guidelines for local action). See note 34 *infra*.

[23] In Mississippi, the presumption in favor of the validity of a statute was defined in the early case of Marshall v. Grimes, 41 Miss. 27 (1866). In upholding an act granting exclusive rights to operate a ferry, the court stated that "a construction should be given to [the statute] that will render it free from constitutional objection, and the presumption must be that the legislature intended to grant such rights as were legitimately within its power." *Id.* at 31. This presumption has thus long been considered a basic rule in statutory construction in Mississippi. *See, e.g.*, Harris v. Harrison County Bd. of Supervisors, 366 So. 2d 651, 656 (Miss. 1979) (upheld statute allowing county board of supervisors to levy and collect ad valorem tax for garbage collection); Rias v. Henderson, 342 So. 2d 737, 738 (Miss. 1977) (presumption applies in the general field of social and economic legislation); Loden v. Mississippi Pub. Serv. Comm'n, 279 So. 2d 636, 640 (Miss. 1973) (upheld statute giving pipeline companies the right of eminent domain); Peterson v. State, 268 So. 2d 335, 337 (Miss. 1972) ("unconstitutionality should appear beyond a reasonable doubt before [a statute] will be held invalid"); Masonite Corp. v. State Oil and Gas Bd., 240 So. 2d 446, 449 (Miss. 1970) (upheld statute granting Oil and Gas Board authority to regulate drilling, to grant exception locations and to prescribe allocations for production); Kohlmeyer & Co. v. Rotwein, 186 So. 2d 768, 773 (Miss.) (upholding statute making lawful all contracts of sale for future delivery of commodities), *cert. denied*, 385 U.S. 971 (1966); L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 382, 53 So. 1, 3 (1910) (presumption held to be elementary rule of construction).

[24] 272 U.S. at 388.

[25] 1 R. ANDERSON, *supra* note 4, at 106; 2 A. RATHKOPF, *supra* note 4, at 21.

[26] Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 959-60 (1st Cir. 1972) (court

unreasonable and arbitrary[27]—that is, if it arguably serves public health, safety, morals, or general welfare[28] while not operating in a discriminatory,[29] capricious, or confiscatory manner.[30] The courts are seldom inclined to act as zoning boards,[31] and the

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disagreement with the judgment of the legislative body will not alone void legislative enactments); Holcomb v. City of Clarksdale, 217 Miss. 892, 900, 65 So. 2d 281, 284 (1953) (zoning is legislative and is not a judicial concern unless arbitrariness is shown); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731, 733, 96 N.Y.S.2d 58, 59 (1951) (same); Willott v. Village of Beachwood, 175 Ohio St. 2d 557, 197 N.E.2d 201, 204 (1964) (judicial judgment is not to be substituted for legislative judgment).

[27] *See, e.g.,* Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889, 892-93 (1974) (so long as zoning is not unreasonable and arbitrary, judicial judgment will not be substituted for that of local legislature); City of Jackson v. McPherson, 162 Miss. 164, 177, 138 So. 604, 605 (1932) (unless the court deems action unreasonable and arbitrary, there is no proper authority to interfere). *See generally,* 1 R. ANDERSON, *supra* note 4, at 104-05. *See also* Currie v. Ryan, 243 So. 2d 48, 52 (Miss. 1971) (evidence was such that city council could have decided either way, hence lower court's cancelling of rezoning was unjustified); Howie v. Autrey, 209 So. 2d 904, 905 (Miss. 1968) (board of supervisors could properly decide that long range planning justified rezoning where increased demand for commercial property could be reasonably anticipated); Fowler v. City of Hattiesburg, 196 So. 2d 358, 362 (Miss. 1967) (though presumption must yield to contrary facts, every intendment is to be made in favor of the reasonableness of the police power exercise).

[28] Nectow v. Cambridge, 277 U.S. 183, 188-89 (1928) (zoning violates fourteenth amendment if health, safety or welfare of a part of the city is not promoted thereby); Maher v. City of New Orleans, 516 F.2d 1051, 1058-59 (5th Cir. 1975) (to be within the police power an ordinance "must bear a real and substantial relation to a legitimate state purpose"), *cert. denied,* 426 U.S. 905 (1976). For an example of an ordinance falling outside the scope of the police power, see Mollineaux's Estate v. Michaelis, 29 Misc. 2d 933, 218 N.Y.S.2d 900, 903 (1961) (evidence did not support denial of permission to use premises for motel because of danger to children from increased traffic since commercial use was already being made of bordering properties).

[29] Zoning practices designed to exclude residents of a particular race or religion have been all too common. For an overview of this area, see M. MANN, THE RIGHT TO HOUSING: CONSTITUTIONAL ISSUES AND REMEDIES IN EXCLUSIONARY ZONING (1976); D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977).

[30] *See, e.g.,* Didlake v. Poteet, 228 Md. 588, 180 A.2d 828, 829 (1962) (rezoning from residential to heavy commercial void because arbitrary and capricious); Northwest Merchants Terminal v. O'Rouke, 191 Md. 171, 60 A.2d 743, 751 (1948) (valid police power could not be exercised at the whim of residential property owners); City of Jackson v. May, 193 So. 2d 555 (Miss. 1967) (city council's refusal to rezone from residential to commercial held arbitrary); Lewis v. City of Jackson, 184 So. 2d 384, 387 (Miss. 1966) (rezoning of country club property to commercial considered unreasonable, arbitrary and capricious where no finding was made of change in community).

[31] *See* Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27, 29 (1953), describing the function of the court as follows:

> It is not the function, duty or right of a Court to zone or rezone, but only to determine whether the legislative body has properly applied the governing law

"fairly debatable" standard of review offers a convenient sieve against the tides of zoning litigation.[32]

To set the stage for analysis of the change or mistake rule, several other fundamentals deserve mention. Because the police power rests in the states rather than in their subdivisions, the power of municipalities or counties to enact, amend, supplement, modify, or repeal zoning ordinances, restrictions, and boundaries must be derived from enabling legislation.[33] The procedural dictates of enabling statutes must therefore be followed in the promulgation of an amendatory ordinance[34] just as they must be followed in the making of an original ordinance; failure to do so, of course, may lead to a ruling of invalidity.[35]

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to the facts. If there is room for reasonable debate as to whether the facts justify the municipal legislature in deciding the need for its enactment, it must be upheld. It is only when there is no room for reasonable debate, or a record barren of supporting facts, that the Court can declare the legislative action arbitrary, capricious, discriminatory or an unequal application of the law.

The Mississippi Supreme Court's position is similar. The courts are not to act as a zoning board for a municipality. Adams v. Reed, 239 Miss. 437, 445, 123 So. 2d 606, 609 (1960).

[32] *Cf.* D. HAGMAN, *supra* note 8 at 211 (noting the desire of some appellate courts to limit review of zoning cases).

[33] MISS. CODE ANN. §§ 17-1-3 to -17 (1972); MD. ANN. CODE art. 66B, § 4.05 (1957); Standard State Zoning Enabling Act §§ 1-5.

State legislatures may authorize adoption of zoning legislation by municipal or quasi-municipal corporations. Ordinarily, zoning is authorized by state statutes or enabling acts, but municipal charters may also authorize and control adoption of zoning ordinances subject to the police power delegated to the municipality by the state. 1 A. RATHKOPF, *supra* note 4 at § 2.02; *see generally* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Gino's of Maryland, Inc. v. Baltimore, 250 Md. 621, 244 A.2d 218, 223 (1968); E. MCQUILLAN, 8 MUNICIPAL CORPORATIONS § 25.50-51 (3rd ed. 1976).

[34] Unfortunately, the Mississippi procedural statute, MISS. CODE ANN. § 17-1-15 (1972), provides little guidance.

> The governing authority of each municipality and county shall provide for the manner in which zoning regulations and restrictions and the boundaries of zones shall be determined, established, and enforced, and from time to time, amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing, in relation thereto, at which parties in interest, and citizens, shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality or county.

Id.

[35] 2 A. RATHKOPF, *supra* note 4, § 27.01, at 27-2 nn.1-3. *See, e.g.*, Brooks v. City of Jackson, 211 Miss. 246, 253-54, 51 So. 2d 274, 276-77 (1951) (ordinance void where notice of public hearing was defective); Morris v. City of Columbia, 184 Miss. 342, 350, 186 So. 292, 293 (1939) (ordinance void where city failed to set forth the character of the zoning

Procedures normally allow amendments with reference either to the textual content of ordinances or "use" classifications. In the latter case the change is usually just entered upon the zoning map, which the ordinance should incorporate by reference.[36] Judicial review of this process, unfortunately, can be severely hindered by the inadequacy of local records; resort often must be made to the zoning map and master plan as the only public record of the amendment proceedings.[37] Use classification modifications are far more numerous than textual amendments; and, predictably, the great bulk of zoning litigation stems from attempts to change use classifications.[38]

In the interest of clarity, variances and exceptions should be distinguished from the amendment process. Variances are escape mechanisms built into most zoning ordinances that allow relief in instances where uniform application of restrictions would serve little public good while causing substantial hardship.[39] Variances are granted at the discretion of an administrative body designated under the ordinance and do not constitute legislative

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before its enactment).

[36] *See, e.g.*, City of Carthage v. Walters, 375 So. 2d 228, 230 (Miss. 1979) (map may be incorporated by reference); Ballard v. Smith, 234 Miss. 531, 540, 107 So. 2d 580, 584 (1958) (same). The purpose of the zoning map is to give notice to the property owner of his zone classification. If the map is incorporated in the zoning ordinance, the map and the text must be considered together. Maps are often used to establish the necessary definiteness and certainty of the boundary. The presumption of validity which attached to the ordinance applies also to boundaries fixed by comprehensive zoning maps. *See, e.g.*, Lambert v. Seabold, 246 Md. 562, 229 A.2d 116, 118 (1967) (reclassification held impermissible due to lack of mistake or change). Maps are not required to be published, but they must be properly filed and accessible to the public. *See, e.g.*, City Council of Augusta v. Irvin, 109 Ga. App. 598, 137 S.E.2d 82, 85 (1964) (ordinance void which evidenced an intent to adopt a map but did not use or attach the map); Soron Realty Co. v. Geddes, 23 App. Div. 2d 165, 259 N.Y.S.2d 559, 561 (1965) (failure to post map or recite in ordinance where the map was on file voided ordinance).

[37] Burke, *The Change-Mistake Rule and Zoning in Maryland,* 25 AM. U.L. REV. 631, 633 (1976). *See also* Comment, *infra* note 48, at 92 (noting that board actions are often unexplained leaving little basis for thorough judicial review).

[38] *See* Khayat & Reynolds, *supra* note 16, at 379 n.97 (noting that of 74 zoning cases examined, 47 dealt with requests for amendments).

[39] P. ROHAN, *supra* note 5, § 1.05 [5b], at 1-26 to 29; Comment, *Zoning Laws—Variances, Exceptions, Amendments,* 29 BOSTON U.L. REV. 406, 407-08 (1949). Under the Mississippi view, it is necessary for the applicant to have suffered some hardship different and greater than that suffered by other owners. Also, variances should be within the spirit of zoning regulations. City of Jackson v. Wilson, 195 So.2d 470, 473 (Miss. 1966).

action. This is the rule even when the authority to grant variances is held by the legislative body responsible for amendments.[40] Special exceptions are another form of deviation from uniformity. This category of relief comes into play when the ordinance contains specific criteria under which an otherwise restricted use may gain administrative approval.[41] Unlike variances, exceptions require no proof of hardship, but the burden does rest on the party applying for an exception to show that his situation conforms to the prescribed criteria.[42] The change or mistake rule has never been applied to variances and exceptions.

In most jurisdictions the presumption[43] of validity given zoning ordinances is applied equally to amendments of those ordinances.[44] If the action is not arbitrary and capricious, the amendment is sustained.[45] In some quarters, however, a need is seen for a standard of review which makes more certain that in-

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[40] P. ROHAN, *supra* note 5, § 1.05[5b] at 1-27, (citing Appeal of Clements, 2 Ohio App. 2d 201, 31 Ohio Op. 2d 328, 207 N.E.2d 573, 579 (passage of variance by city council was administrative and not legislative act)). *See also* Nelson v. Donaldson, 255 Ala. 76, 50 So. 2d 244, 251 (1951) (power to grant variances is quasi-judicial function by an administrative board).

[41] 3 R. ANDERSON, *supra* note 4, §§ 19.01-.02, at 356-65; 1 P. ROHAN, *supra* note 5, § 1.02[5b], at 1-25 to 26. For an example of a court's limiting its review to the criteria set forth in the ordinance, see City of Naples v. Central Plaza of Naples, Inc., 303 So. 2d 423, 424-25 (Fla. App. 1974) (in ruling on exception city could not consider fear of aggravated traffic conditions and strained support facilities as applicant complied with all specified criteria).

[42] Turner v. Hammond, 270 Md. 41, 310 A.2d 543, 551 (1973) (applicant must show compliance with terms of ordinance but need not show accord with general welfare). One common requirement for an exception is the permission or consent of neighboring landowners. R. ANDERSON, *supra* note 4, § 19.15, at 409; *see, e.g.,* Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979) (city could not deviate from established exception procedure requiring all owners and tenants of adjacent property to sign application for mobile home in A-1 residential zone).

[43] See notes 60, 61 and accompanying text *infra* for discussion of the general effect of a presumption.

[44] 1 R. ANDERSON, *supra* note 4, § 3.14, at 107-8. *See, e.g.,* Bartlett v. Middletown Township, 51 N.J. Super. 239, 143 A.2d 778, 790 (1958) (presumption toward original ordinance must give way to presumed correctness of amendatory ordinance).

[45] *See, e.g.,* Willdel Realty, Inc. v. New Castle County, 281 A.2d 612, 614 (Del. 1971) (it is sufficient if ordinance is not arbitrary and capricious and is reasonably related to public health, safety and welfare); City of Waxahachie v. Watkins, 154 Tex. 206, 275 S.W.2d 477, 481 (1955) (court has no authority to intervene unless change is unreasonable and arbitrary).

dividual zoning changes conform to legislative justifications.[46] This notion derives from a fear that an ordinance, which is presumed to be a good and accurate representation of the needs of the community, will lose its stability if too many zoning changes are made.[47] Moreover, if an amendment is presumed to be valid and if the original ordinance is presumed to have been valid, a dilemma is created as to allocation of the burdens of proof and persuasion.[48] In the Maryland Court of Appeals, search for a satisfactory resolution of this dilemma led to the articulation and application of the change or mistake rule.[49] Thereunder the presumption is shared,[50] and an amendatory reclassification will be found valid only if it has been shown that a mistake existed in the original ordinance, or that a substantial change has occurred in the conditions of the neighborhood affected by the amendment since the enactment of the original ordinance.[51]

Since 1953[52] the courts of Mississippi have closely followed

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[46] *See* Burke, *supra* note 37, at 633; *see generally* Legato, *Developments in the Search for Workable Standards of Judicial Review of Piecemeal Rezoning*, 24 CATH. U.L. REV. 294 (1975).

[47] Stability in zoning is a legitimate factor in maintaining property values. For an example of contestants voicing concern as to lack of stability, see Fowler v. City of Hattiesburg, 196 So. 2d 358, 359 (Miss. 1967) (rezoning of large tract alleged to affect adversely residential development and destroy faith in zoning stability).

[48] *See* Comment, *Zoning Amendments: The Effect of Maryland's Change or Mistake Rule on the Fairly Debatable Standard—Who's Got the Presumptions?* 10 URB. L. ANN. 365, 367-68 (1975) (discussing the shifting of presumptions in zoning but arguing that the change or mistake rule may further complicate the issue).

[49] The origin of the change or mistake rule is somewhat obscure. The rule is commonly thought to have first emerged in its composite form in Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27-30 (1953). However, in MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325 (1965), Justice Barnes noted in his dissent that the "mistake-change in conditions rule came into the Maryland law by way of dicta . . . and in a rather oblique way." 238 Md. 549, 210 A.2d at 340. He noted further that the change in conditions portion of the rule appeared to be first stated, without supporting authority, in Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 191, 60 A.2d 743 (1948), and that the mistake portion of the rule first emerged in Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951). 238 Md. 549, 210 A.2d at 340. The development of change or mistake review is discussed in Linowes & Delaney, *The Maryland Change-Mistake Rule in Zoning: A Mistake that Should be Changed*, 1971 LAND-USE CONTROLS ANNUAL 117.

[50] See notes 82 through 86 and accompanying text *infra*.

[51] *E.g.*, Wahler v. Montgomery County Council, 249 Md. 62, 238 A.2d 266, 269-70 (1968); Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578, 589 & 591 (1966); MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325, 328 (1965).

[52] Change or mistake review first appeared in decisions of the Mississippi Supreme

the change or mistake standard, applying it even more regularly than their Maryland counterparts.[53] This is not to say that decisions in both states have not recognized, on occasion, other factors important in the consideration of zoning amendments.[54] But regrettably, the Mississippi rule has undergone negligible substantive variation and, as a result, lacks even the limited versatility of the Maryland version. Maryland has been described as among "the least progressive states regarding amendment of existing zoning ordinances,"[55] and pressure has often been exerted on the court to broaden its interpretations of the rule.[56] Thus, it would seem that far stronger language is justified in criticizing the more conservative Mississippi amendatory practice.

In addition to Mississippi and Maryland, eight states have applied change or mistake analyses, although at times with reluctance and modification.[57] Other states, of course, consider cir-

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Court in W.L. Holcomb, Inc. v. City of Clarksdale, 217 Miss. 892, 900, 65 So. 2d 281, 284 (1953). See notes 92, 93 and accompanying text *infra*.

[53] *Compare* City of Jackson v. Shell Oil Co., 347 So. 2d 340, 341 (Miss. 1977) (applying the rule to comprehensive rezonings) *with* Scull v. Coleman, 251 Md. 6, 246 A.2d 223, 226 (1968) (holding the rule inapplicable to comprehensive rezonings). *See also* Knudsen v. Montgomery County Council, 241 Md. 436, 217 A.2d 97, 101 (1966) (floating zone does not require proof of change or mistake); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429, 432 (1959) (conditional zoning or special exceptions not under change or mistake requirement). See text beginning at note 52, *supra*, for analysis of differences in Mississippi and Maryland applications of the rule.

[54] *See, e.g.*, Board of County Comm'rs v. Edmonds, 240 Md. 680, 215 A.2d 209, 211 (1965) (expressing concern for public interest, health and safety); Dicks v. City of Natchez, 319 So. 2d 214, 217-18 (Miss. 1975) (owner's loss of sale was a consideration but did not alone prohibit rezoning); City of Jackson v. Bridges, 243 Miss. 646, 655, 139 So. 2d 660, 664 (1962) (effect on land values will not control but is a proper element for consideration). See note 91 *infra*.

[55] Goldman, *Zoning Change: Flexibility vs. Stability*, 26 Md. L. Rev. 48, 61 (1966).

[56] *See* Liebman, *Maryland Zoning—The Court and Its Critics*, 27 Md. L. Rev. 39 (1967) (discussing pressure to recognize population growth as determinant of change). *Id.* at 50. But the author, a supporter of the change or mistake rule, notes with approval that the court has been responsive to the population-increase-as-change argument only in cases dealing with convenience facilities serving the locality to be reclassified. Where the facility would serve a non-local need while imposing to some degree a local burden, the court's view is that reclassification should come through legislatively backed regional planning and not through piecemeal judicial decisions. *Id.* at 50-51, (citing Board of Comm'rs v. Kines, 239 Md. 119, 125, 210 A.2d 367, 369-70 (1965) (highway construction and improvements are not evidence of sufficient neighborhood change to permit piecemeal zoning)); Alvey v. Michaels, 231 Md. 22, 25, 27, 188 A.2d 293, 294, 295 (1963) (denial of reclassification for marina primarily benefitting non-residents).

[57] *See* Clark v. Boulder, 146 Colo. 526, 362 P.2d 160, 162 (1961) (there must be a

cumstances of change or allegations of mistake but do so without elevating the inquiry to an all-determinative status.[58] Even in Maryland, extensive use of the rule has been the subject of controversy among members of the court;[59] and, significantly, the rule has been explicitly rejected or emasculated by limitation in several states.[60] There appears to be a dichotomy of opinion as to whether the rule is harmful in creating obstacles to flexible zoning[61] or useful in providing courts with a means of maintaining a firm position against unnecessary reclassifications.[62] Neverthe-

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material change in character of neighborhood); Aronovitz v. Metropolitan Dade County, 290 So. 2d 536, 537 (Fla. Dist. Ct. App. 1974) (there must be material change in circumstances); Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492, 494 (Ky. 1974) (statute requires showing of mistake or major changes in economic, social, or physical nature in the affected area); DuFau v. Parish of Jefferson, 200 So. 2d 335, 338 (La. Ct. of App. 1967) (before rezoning is approved there should be proof either of mistake or change); Shilling v. Midland, 38 Mich. App. 568, 196 N.W.2d 846, 850 (1972) (must be a mistake or change as provided in Maryland rule); Blades v. North Carolina, 280 N.C. 531, 187 S.E.2d 35, 44 (1972) (changed conditions are required); Smith v. County of Washington, 241 Or. 380, 406 P.2d 545, 547 (1965) (there must be substantial evidence of change in order to rezone); Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889, 893 (1974) (differing from the Maryland rule in that strong evidence is not required and in that the rule is to be applied only to downzoning).

[58] D. HAGMAN, *supra* note 8, at 193-94; 2 A. RATHKOPF, *supra* note 4, § 27.03, at 27-15 to 16.

[59] *See, e.g.*, MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325, 340-41 (1965) (Barnes, J., dissenting) (rule has had unhealthy growth in Maryland law). See notes 142 & 143 and accompanying text *infra*.

[60] *See* Malafronte v. Planning & Zoning Board, 155 Conn. 205, 230 A.2d 606, 609 (1967) (requirement of change to be employed only where amendment is patently arbitrary); Willdel Realty, Inc. v. New Castle County, 281 A.2d 612, 614 (Del. 1971) (it is unnecessary in rezoning to show change or mistake); Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664, 667 (1956) (no need to show substantial change to change zoning classifications); Cianciarnlo v. Tarro, 92 R.I. 282, 168 A.2d 719, 725 (1961) (no need to show change or mistake unless amendment results in spot zoning); Thompson v. City of Palestine, 510 S.W.2d 579, 582 (Tex. 1974) (implying that only spot zoning is subject to the showing of change or mistake).

[61] Goldman, *supra* note 55, at 49-51. Goldman summarizes Maryland change or mistake cases as "indicative of the often insurmountable obstacles facing the property owner or legislature desiring to amend the existing regulations and the limited amount of aid that can be derived by appeal to the judiciary." *Id.* at 51. *See also* Comment, *supra* note 48, at 374-75, discussing a line of cases following Pattey v. Board of County Comm'rs, 271 Md. 352, 317 A.2d 142, 146 (1974) (requiring strong evidence of change), under which amendments are most often defeated. *But see* Burke, *supra* note 37, at 643 (stating that change or mistake is a "rule of flexibility and close land-use examination").

[62] *See* Liebmann, *supra* note 56, at 43-54. Liebmann discusses the rule as a creditable means of contending with three great sources of difficulty in zoning law: (1) the tension between traditional judicial deference to administrative decisions and the need for

less, in view of the small number of states following the rule, there can be no doubt that its adherents stand in a distinct minority.

II. "Fairly Debatable" Review Under the Rule

Change or mistake review modifies the traditional presumption of validity effective in zoning matters.[62.1] When the rule is in force, the "fairly debatable" doctrine equates reasonableness of a rezoning ordinance with the sufficiency of evidence supporting the existence of a mistake or changed circumstances. Thus, it does not follow that any showing of change or mistake mandates rezoning.[63] An example of this principle is provided in *Park Construction Corp. v. Board of County Commissioners,*[64] a 1967 Maryland case in which a landowner sought rezoning of certain residential property to a higher density residential classification, R-18. The property, though still in the vicinity of single family residential structures, was now adjacent to street and public utility rights-of-way and institutional uses such as two schools and an agricultural research center. Although the planning staff and planning commission recommended approval of the request, the county commissioners concluded that the rezoning application was premature[65] and not "in the best interest of the orderly development of the County, as set forth in the legislative act."[66] The court, in its examination of the evidence, could not say "that a reasonable man could not conclude—as the Board con-

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intensive review due to the construction industry's influence upon zoning bodies; (2) the lack of clarity as to whether certain zoning determinations are in fact administrative rather than legislative in nature; (3) the problems arising from the lack of metropolitan government around urban centers. *Id.*

[62.1] *See, e.g.*, Higginbotham v. Barrett, 473 F.2d 745, 747 (5th Cir. 1973) (as exercise of legislative judgment, zoning is subject to judicial control only if arbitrary and without rational basis). See notes 27 through 30 and accompanying text *supra*.

[63] Burke, *supra* note 37, at 636 (noting that the rule imposes no duty to rezone); Comment, *supra* note 48, at 374-75 (noting that requirements of evidential sufficiency serve to block rezoning attempts).

[64] 245 Md. 597, 227 A.2d 15 (1967).

[65] *See* Burke, *supra* note 37, at 642-43, commenting upon the need for a confluence of changes for rezoning to be approved under the rule. Specifically, Burke states: "The developer must catch the wave of commercialization at precisely the right moment. If he has waited too long, the application will be denied because of congestion problems; if he is too soon his proposed use is premature and will be an intrusion." *Id.* at 643.

[66] 227 A.2d at 18.

cluded—that there was no immediate need for additional R-18 zoning."[67] In short, the matter was fairly debatable.

A Mississippi case, *Harrison v. City of Jackson,*[68] is also illustrative. There a piece of property had been rezoned from residential to commercial by the city council. Adjacent owners protested, contending that sufficient evidence of change was not shown. The court refused to delve into factual complexities. The evidence of change being sufficient to qualify the city council's order as "at least a debatable question," the rezoning was upheld.[69] From the vagueness of this test, it is obvious that similar facts may lead to different conclusions and that some irregularities may go without redress. Thus, though the change or mistake rule is designed to provide a more coherent structure for rezoning decisions,[70] fairly debatable review continues to obscure subtle evidential considerations.[71] The result is not a more thorough judicial review but, in fact, a scope of review which is peculiarly narrow and insensitive to significant factors that do not fall clearly within the parameters of "change" or "mistake."

III. Burden of Proof

The presumption flowing from the "fairly debatable" test operates much as any other presumption:[72] one party suffers an

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[67] *Id.* at 19. The court noted that under the facts the commissioners might well have approved the rezoning but that substantial evidence existed to support the denial. Thus to reverse would mean a substitution of the court's judgment for that of the commissioners. *Id.*

[68] 253 So. 2d 535 (Miss. 1971).

[69] *Id.* at 536.

[70] *See* Liebmann, *supra* note 56, at 45 (favoring the Maryland practice over the law scrutiny practices under which most amendments are approved).

[71] City of Jackson v. Ridgway, 261 So. 2d 459, 460 (Miss. 1972) (zoning is essentially a legislative function and judicial review is limited).

[72] A presumption is a principle under which the establishment of one fact is deemed sufficient to satisfy a party's burden of producing evidence with regard to another fact and, under the preferable view, shifts the burden of persuasion to the opposing party. C. McCormick, Handbook of the Law of Evidence § 343, at 806 (2d E. Cleary ed. 1972). A conclusive presumption is final and irrebuttable; a procedural presumption can be rebutted by the production of credible evidence. Maryland Casualty Co. v. Williams, 377 F.2d 389, 394 (5th Cir. 1967). The procedural presumption bears out the most widely accepted view of the effect of a presumption, that effect being expressed by the "bursting bubble" theory. Under this theory, the effect of a presumption is only to shift the burden of producing evidence with regard to the fact presumed; and once the opponent presents such evidence, the presumption disappears. C. McCormick, *supra* § 345, at 821. *See generally*

exacting burden of proof.[73] In the case of original zoning enactments, challengers will invariably bear this burden.[74] For amendments, the peculiar effect of the change or mistake rule is that the bearer of the burden is determined by the context and course of the dispute. Amendments are most often proposed by persons desiring development more intensive in nature than existing use classifications permit.[75] The premise of the change or mistake rule places the initial burden of proof upon the prospective developer, as he is seeking to overcome the presumption of correctness and reasonableness afforded the existing ordinance.[76] His petition first would be addressed to the local zoning commission. If the amendment is denied, appeal is to the mayor and board of aldermen (or other final local authority) and then to the courts.[77] To merit success at any stage, the developer must make a clear showing of unreasonableness, *i.e.*, mistake in the original enactment or subsequent change in the area.[78] The local authority need only prove its denial to have been on fairly debatable grounds.[79]

Mueller, *Instructing the Jury upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301,* 12 LAND & WATER L. REV. 219 (1977); Comment, *Presumptions in Civil Cases; Procedural Effects under Maryland Law in State and Federal Forums,* 5 U. BALT. L. REV. 301 (1976).

[73] When public policy considerations underlying a presumption are especially strong, courts have required heavy burdens of persuasion measured not just by the preponderance of evidence but by the clear and convincing standard. C. MCCORMICK, *supra* note 72, § 343, at 810; *see, e.g.,* Sullivan v. City of Bay St. Louis, 375 So. 2d 1200, 1201 (Miss. 1979) (overcoming zoning's presumption of permanency requires clear and convincing evidence). But in the normal context presumptions do not operate to raise the standard of proof. Breeden v. Weinberger, 493 F.2d 1002, 1005-06 (4th Cir. 1974).

[74] *See, e.g.,* Ballard v. Smith, 234 Miss. 531, 546-47, 107 So. 2d 580, 586 (1958) ("The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence.").

[75] Burke, *supra* note 37, at 634. Mississippi cases clearly demonstrate this tendency. *See, e.g.,* Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143, 144 (Miss. 1973) (request by landowner for change from A-1 residential to commercial classification); City of Jackson v. Husbands, 233 So. 2d 817, 818, 820 (Miss. 1970) (same).

[76] See note 25 and accompanying text *supra.*

[77] On appeal, the circuit court reviews the record as an appellate court and should not reverse municipal action that is not arbitrary and unreasonable. City of Jackson v. Husbands, 233 So. 2d 817, 820 (Miss. 1970).

[78] *See, e.g.,* Board of Supervisors v. Roberts, 287 So. 2d 436-37 (Miss. 1973) (refusal to rezone was proper where petition did not allege and record did not establish change); Coleman v. Southwood Realty Co., 271 So. 2d 742, 743 (Miss. 1973) (proper owner desiring the rezoning must show mistake or change).

[79] Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143, 145 (Miss. 1973)

If the decision by the local government is to grant the amendment and if this decision is contested by interested parties,[80] a different scenario unfolds. The developer and local government, now on the same side, find themselves arguing on appeal that the second legislative decision should enjoy a presumption of correctness and reasonableness equal to that of the original ordinance. At the same time, the opponents of the rezoning will urge that the rezoning decision is unreasonable and deserves closer review than a decision underlying an original ordinance.[81] The change or mistake rule in effect resolves this dispute in favor of the contestants, although not without an air of ambivalence. The presumption of reasonableness applies to amendments "but not to the same degree"[82] or "with as great force."[83] As expressed by the Mississippi Supreme Court, a presumption remains "that the original zoning was well planned in the first instance and intended to be more or less permanent."[84]

(board's denial fairly debatable where only evidence in support of amendment was certificate of highest and best use from realtor).

[80] For a brief discussion of standing problems, see the text beginning at note 131.

[81] Burke, *supra* note 37, at 634. This factual situation is illustrated by Minshew v. Smith, 380 F. Supp. 918 (N.D. Miss. 1974), an action in which home owners alleged a conspiracy among city officials and a motel owner to bring about an amendment expanding the central business district of Oxford to allow additional off-street parking. Evidence of mistake was offered by the city, and the court found no preferential treatment since restrictions had been released in three separate areas. *Id.* at 927.

[82] Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966).

[83] American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727, 731 (1954). *See also* Mettee v. County Comm'rs, 212 Md. 357, 129 A.2d 136, 141 (1957) (presumption of reasonableness applicable to rezoning as well as to original zoning, though with less weight). But in a critique of the change or mistake rule, Maryland's Justice Barnes noted the unreasonableness of ascribing a strong presumption in favor of the original zoning ordinance and in not applying the presumption with the same weight to a rezoning ordinance. "In my opinion, the presumption of reasonableness is just as strong in support of the original zoning ordinance. This seems to be the general rule." MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325, 342 (1965)(Barnes, J. dissenting).

Rathkopf has described the Maryland rule as a limitation upon the power of the legislative body to rezone rather than as rule of presumption. Further, the implication of this is that the one petitioning for a change in a zoning classification is compelled to provide sufficient evidence to demonstrate a mistake in the original zoning ordinance or alternatively that substantial changes have occurred in circumstances in the neighborhood as a condition prerequisite to operation of the presumption. Only where sufficient evidence has been presented to support the petitioner's request and to make the issue fairly debatable does the presumption of validity of the zoning amendment apply. 2 A. RATHKOPF, *supra* note 4, § 27.03[1][a], at 27-12.

[84] Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966).

The Maryland court has perhaps expressed this view even more starkly, in stressing that all zoning measures are presumed reasonable, but that without proof of mistake or substantial change in the area, the presumption as to piecemeal rezoning[85] is destroyed.[86]

The result is that under the change or mistake rule "the presumption of validity is insufficient to protect a zoning amendment from attack; proponents of the amendment must at least come forward with evidence of change or mistake."[87] This stands in contrast to the minimal justification or mere rational relation required for original zoning or other economically based legislation.[88] An illustration of this effect is found in the Maryland case of *American Oil Co. v. Miller.*[89] There contestants of rezoning from agricultural to heavy commercial prevailed because the county commissioners and other zoning proponents failed to present adequate substantiation of alleged errors in the original ordinance regarding topography and the number of commercially zoned sites. Adequate evidence of alleged changes in the area's conditions was also lacking. The commissioners' opinions, without more, were insufficient to merit the reclassification.[90]

The Supreme Court of Mississippi has been reluctant to deviate from literal adherence to the change or mistake rule.[91] The

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[85] Piecemeal rezoning is clearly distinguished under Maryland decisions from comprehensive rezonings. Comprehensive rezoning shares equally with original enactments the strong presumption of correctness. Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244, 249 (1973); Wells v. Pierpont, 253 Md. 554, 253 A.2d 749, 751 (1969); France v. Shapiro, 248 Md. 335, 236 A.2d 726, 730 (1968); Roberts v. Grant, 20 Md. App. 247, 315 A.2d 103, 106 (1974).

[86] County Comm'rs v. Merryman, 222 Md. 314, 159 A.2d 854, 860 (1960).

[87] 1 R. ANDERSON, *supra* note 4, § 3.15, at 108, (citing DePaul v. Board of County Comm'rs, 237 Md. 221, 205 A.2d 805, 807 (1965) (where record is devoid of supporting facts a court may find invalidity)); Montgomery County Council v. Scrimgeour, 211 Md. 306, 127 A.2d 528, 533 (1956) (no specific testimony to support the intended new classification); Lewis v. City of Jackson, 184 So. 2d 384, 387 (Miss. 1966) (rezoning found unreasonable where evidence did not show change). See note 107 and accompanying text *infra*. *See generally* Linowes & Delaney, *supra* note 49.

[88] *See, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1936) (due process satisfied if laws have a reasonable relation to a proper legislative purpose).

[89] 204 Md. 32, 102 A.2d 727 (1954).

[90] *Id.,* 102 A.2d at 732-33.

[91] While not departing from the rule, the court has acknowledged several other considerations. Khayat & Reynolds, *supra* note 16, at 380 (citing Harris v. City of Jackson, 268 So. 2d 342, 344 (Miss. 1972) (public need for the change in classification)); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 503, 176 So. 2d 267, 270

rigidity of the Mississippi position belies an overall lack of sophistication in dealing with zoning matters. For instance, when the court adopted the change or mistake rule in *W.L. Holcomb, Inc. v. City of Clarksdale,*[92] it incorporated the same burden of proof employed in original zoning cases; the protesting individual was always to have the burden.[93] With regard to litigation over the refusal to amend, there is little difference between the respective positions taken by the courts of Mississippi and Maryland.[94] That the *Holcomb* court apparently did not realize that a uniform allocation of the burden was not entirely suited to the basic supposition of the rule,[95] however, is a source of confusion. That supposition is simply that individual property owners deserve greater protection from abuse or laxity in rezoning practices of local governments.[96] The literal rule of *Holcomb* is that (unlike the Maryland practice) there is no shifting of the burden to proponents where an amendment has been granted and there is subsequent litigation by those aggrieved. The aggrieved parties are compelled to prove the rezoning unreasonable for lack of sufficient evidence of change or mistake. It appears, then, that if *Holcomb* were followed with respect to burden of proof, Mississippi would share fully in the drawbacks of the rule without enjoying its major benefits.

It is evident, however, that the uniform burden rule announced in *Holcomb* is not the standard being employed by the court. Indeed, in litigation challenging decisions to rezone, the court has often proceeded without direct references to burden of proof. In *Fowler v. City of Hattiesburg,*[97] for instance, the court

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(1965) (fraud); City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 91, 121 So. 2d 120, 122 (1960) (highest and best use). *But see* City of Jackson v. Bridges, 243 Miss. 646, 656, 139 So. 2d 660, 664 (1962) (aesthetics held improper basis for rezoning).

[92] 217 Miss. 892, 65 So. 2d 281 (1953).

[93] *Id.* at 901, 65 So. 2d at 284.

[94] See notes 65-67 and accompanying text *supra. See, e.g.,* Moore v. Madison County Bd. of Supervisors, 227 So. 2d 862, 863 (Miss. 1969) (upholding refusal to rezone to commercial where supporters of rezoning failed to show error or change).

[95] The *Holcomb* opinion consists of little more that a series of excerpts from 62 C.J.S. *Municipal Corporations* § 228(2)(b) (1949). The cases cited in C.J.S. all predate the change or mistake rule. *Id.,* at nn.99-4. See notes 8 through 51 and accompanying text *supra* discussing the origins of the rule.

[96] See notes 46 through 49 and accompanying text *supra.*

[97] 196 So. 2d 358 (Miss. 1967). The mayor and commissioners rezoned thirty-three acres from residential to commercial to allow construction of a shopping center. Neighboring homeowners and business owners from other parts of the city objected. *Id.* at 359.

never mentioned burden of proof, although it took full note of the ample evidence of change existing in the record.[98] Moreover, *Lewis v. City of Jackson*[99] is explicitly distinguished in *Fowler* with regard to findings of change. The opposite result in *Lewis,* a reversal of the rezoning, was attributed to the lack of evidence of change set forth in that case.[100] Thus, in the rezoning proceedings Hattiesburg had built an adequate record and met its burden; Jackson had not. The decision in *Underwood v. City of Jackson*[101] is in this vein. The *Underwood* court clearly conditioned the exercise of amendment power by a municipality upon showings of mistake or change in conditions.[102] A 1979 ruling, *Sullivan v. City of Bay St. Louis,*[103] is even more specific. Noting the basic rules of presumption and the necessity for showings of change or mistake or public need in rezonings, the court pointed out that the burden lay with the city and landowner seeking the reclassification. The burden was not met, hence, the rezoning was arbitrary, capricious and discriminatory.[104] The presence of "public need" as a possible justifying factor is notable; it could well be that the court may choose to drift away from the change or mistake rule toward the more liberal scrutiny of "public need."

In addition, the 1978 decision in *City of Jackson v. Shell Oil Co.,*[105] provides a clear warning that a proponent cannot rely solely upon the burden cast upon the contestant. The city had prepared a comprehensive rezoning ordinance covering certain property owned by Shell. Under the rezoning, the subject property's classification was changed from commercial to limited commercial.[106] Shell petitioned for reconsideration, demonstrating the absence of any change in neighborhood conditions other than increased commercial activity. The city denied the petition

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[98] *Id.* at 362.

[99] 184 So. 2d 384 (1966). The city of Jackson rezoned 8.93 acres from residential to commercial to allow construction of a shopping mall, and nearby residents objected. *Id.* at 385.

[100] 196 So. 2d at 361-62.

[101] 300 So. 2d 442 (Miss. 1974).

[102] *Id.* at 443.

[103] 375 So. 2d 1200 (Miss. 1974).

[104] *Id.* at 1201.

[105] 347 So. 2d 340 (Miss. 1977).

[106] *Id.* at 340.

without presenting evidence substantiating a change in conditions surrounding the subject property. The circuit court reversed the city's action, and in affirming the supreme court noted: "The question of who had the burden of proof is actually not involved. The only proof offered showed no material change and it is immaterial who offered it."[107] Thus, so far as burden of proof was concerned, the result was similar to that in *American Oil Co. v. Miller.* A mere conclusion, without more, is insufficient to establish or deny the existence of change or mistake.[108]

One area in which the Mississippi Supreme Court has chosen not to extend application of change or mistake proof requirements is illustrated by its decision in *Gatlin v. City of Laurel.*[109] The city in that case had annexed certain land, and, under the existing zoning ordinance, annexed land automatically assumed a single family residential use classification. Owners of a tract within the annexed area petitioned for a rezoning to heavy general business classification, and while the city did enact a rezoning to commercial, it was to a subclass of less intense use than the owners had requested. Interested neighbors opposed any change in classification whatsoever, then joined in the dispute. The circuit court reversed the city's action and granted the rezoning to heavy general business use.[110] Before the supreme court, the "aggrieved" neighbors attempted to invoke the change or mistake rule, since there had been no findings of such nature by the city or circuit court. The resulting decision affirmed the circuit court. Change or mistake requirements were held not to apply because the initial "automatic" classification for residential use had not been in compliance with notice and hearing requirements and thus was not binding.[111] Proof of change or mistake would be necessary only where there was a "proper initial classification from which the change is being made." It appears from this reasoning, also, that where an amendatory measure goes only to procedural matters or in no way alters existing use classifications, the rule is not a proper consideration for local governments or the courts.

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[107] *Id.* at 341.

[108] See note 90 and accompanying text *supra.*

[109] 312 So. 2d 435 (Miss. 1975).

[110] *Id.* at 437-39.

[111] *Id.* at 439-40.

IV. Mistake in the Original Ordinance

Cases seeking to prove a mistake in the original ordinance are not as prevalent as those alleging a substantial change in conditions. Prior to a discussion of the "change" portion of the rule, however, a brief examination of the "mistake" segment is necessary.

Demonstration of a mistake has involved such points as proving that an error occurred in drafting a zoning map,[112] showing that a legislative body was unaware of the existence of certain facilities at the time of the original enactment,[113] or proving that there was a clerical error in the original zoning ordinance.[114] The Maryland court has, however, stressed that the essential concern is not the present appropriateness of the zoning but whether the local legislature made a basic and actual mistake at the time of the original enactment.[115] In any event, there should be no minimization of the difficulty in utilizing the mistake approach to justify rezonings. One of the fundamental weaknesses of the change or mistake rule is the lack of any workable formula for resolving allegations of error by the legislature.

The weight afforded recommendations by planning boards and specialists has been one troublesome area. For instance, in a Maryland case a county council was shown to have been under the false impression that on the original zoning map the planning board had recommended residential rather than commercial use for a particular tract;[116] yet the court refused to make inferences regarding the motivation for the zoning and required proof of actual (non-clerical) mistake, "no matter what reason prompted the Council's action . . . ."[117] Expert testimony was brushed

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[112] *See* City of Jackson v. Holliday, 246 Miss. 412, 418-19, 149 So. 2d 525, 526-27 (1963) (error is sufficient to upset *res judicata* effect of prior judgment).

[113] Bonnie View Country Club, Inc. v. Glass, 242 Md. 46, 217 A.2d 647, 651 (1966) (unknown mine shafts and rock formations).

[114] Metropolitan Homes, Inc. v. Town Plan & Zoning Comm'n, 152 Conn. 7, 202 A.2d 241, 242 (1964) (intended zoning change omitted through clerical error).

[115] Surkovich v. Doub, 258 Md. 263, 265 A.2d 447, 451 (1970), (quoting Miller v. Abrahams, 239 Md. 263, 211 A.2d 309, 311 (1965)). *See also* 2 A. Rathkopf, *supra* note 4, § 27.03, at 27-14 (discussing the difficulty which the mistake portion of the rule has caused courts).

[116] Miller v. Abrahams, 239 Md. 263, 211 A.2d 309, 310-11 (1965).

[117] 211 A.2d at 309-11.

aside and sufficient mistake was not found.[118] This decision, however, must be read in conjunction with *Jobar Corp. v. Rodgers Forge,*[119] an earlier decision of the same court in which testimony of the same experts was under review. There the court accepted the expert opinion as to the existence of mistake and indicated that a local government's acceptance of such opinion would not be reversed unless the acceptance was arbitrary and capricious.[120]

In *Stratakis v. Beauchamp*[121] the court took special pains to defend its failure to follow expert testimony and the planning staff report. Accordingly, it was held that expert opinion is not strong enough to demonstrate error "unless the reasons given by the expert as the basis for his opinion or other supporting facts relied upon by him are, themselves, substantial and strong enough to do so."[122] While recognizing that the reports of planning staffs alone had been found sufficient to make a zoning decision fairly debatable,[123] the *Stratakis* court extended to staff reports this same careful, if not skeptical, study of underlying reasons.[124] From this language it is apparent that the court wished to reserve substantial discretion as to its recognition of technical data and recommendations. It should be obvious, however, that this tendency is not consistent with the general rule that courts are not to act as zoning boards.[125]

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[118] *Id.* at 314-15. Expressing criticism of the reasoning offered by a planning consultant, the court found the evidence of mistake failed to establish a debatable question. *Id.* at 318.

[119] 236 Md. 106, 202 A.2d 612 (1964).

[120] *Id.*, 202 A.2d at 621.

[121] 268 Md. 643, 304 A.2d 244 (1973).

[122] *Id.*, 304 A.2d at 250.

[123] *See, e.g.*, Montgomery v. Board of County Comm'rs, 263 Md. 1, 280 A.2d 901, 905 (1971) (recommendation of technical staff constitutes probative evidence).

[124] 268 Md. 643, 304 A.2d at 251. *See also* Surkovich v. Doub, 258 Md. 263, 265 A.2d 447, 451 (1970) (experts should note what should have been foreseen by the enacting legislature).

[125] See note 31 and accompanying text *supra.* An interesting comparison can be made to a case applying the Mississippi change or mistake rule, Minshew v. Smith, 380 F. Supp. 918 (N.D. Miss. 1974). In *Minshew* each side produced witnesses with planning experience, but in the end the court appeared to rely upon contentions of the defense witnesses that an error existed since the comprehensive ordinance provided for off-street parking for commercial enterprises without providing for off-street lots in residential zones where such zones and commercial enterprises adjoined one another. *Id.* at 927. It is important to note, however, that the court did not divulge any standard for evaluation of professional recommendations.

Problems with respect to technical opinions and data as well as other difficulties in efforts to satisfy the rule on the basis of mistake arise from a perception by the courts that the strong presumption of correctness given original zoning requires parallel strength in the evidence of mistake.[126] Fortunately, the standard is relaxed to some degree when the reclassification is from one subcategory to another rather than from one main category to another.[127] In other respects, the presumption is hardy indeed. It continues even in the face of such evidence as a showing that a zoning district line was at a place other than that recommended in a county's comprehensive plan.[128] The Mississippi Supreme Court, of course, fully recognizes the presumption and requires clear and convincing evidence to overcome it.[129] However, where the evidence does satisfactorily show a mistake in prior zoning, the court has had no trouble in dismissing arguments that the rezoning is arbitrary, capricious or confiscatory.[130]

V. Change in Neighborhood Conditions

There are two spatial determinations that arise under this rule. The first concerns the delineation of the neighborhood for operation of the change portion of the rule. This will be addressed later. The second determination arises where the standing of a contestant is brought into issue. Maryland's statutory provisions require no more than that the party to an appeal be "aggrieved."[131] Those "adjoining, confronting or nearby" the sub-

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[126] Valenzia v. Zoning Bd., 270 Md. 478, 312 A.2d 277, 280 (1973) (rule is one of monotonous regularity); Mayor & Council v. Henley, 268 Md. 469, 302 A.2d 45, 46 (1973) (mistake not found where only evidence was bald assertion of realtor). *See also* Pattey v Board of County Comm'rs, 271 Md. 353, 317 A.2d 142, 146 (1974) (trial judge fell into error by confusing mistake in master plan with mistake in zoning classification).

[127] Tennison v. Shomette, 38 Md. App. 1, 379 A.2d 187,190 (1977).

[128] Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889, 893 (1974) (ordinance different from comprehensive plan).

[129] Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143, 145 (Miss. 1973). Even certification by a realtor that the zoning change would accommodate the highest and best use of the property was insufficient. *Id.* at 144. *See also* Sullivan v. City of Bay St. Louis, 375 So. 2d 1200, 1201 (Miss. 1979) (indicating the need for clear and convincing evidence).

[130] Dicks v. City of Natchez, 319 So. 2d 214, 217 (Miss. 1975) (rezoning to correct mistake in former ordinance).

[131] Md. Ann. Code art. 66B, § 4.08 (1957).

ject property are deemed, prima facie, to be "aggrieved,"[132] and some flexibility is exercised as to what distances fall within this category.[133] Where an opponent's property falls outside the "adjoining . . ." classification, however, the protestant must allege and prove by competent evidence a special and adverse effect upon his personal or property rights.[134]

In Mississippi, statutory language is ambiguous with regard to standing,[135] and there has been some variation in interpretations. In *Board of Supervisors v. Abide Brothers, Inc.*,[136] the court interpreted section 17-1-17 to mean that only property owners within 160 feet of the subject property could validly object:[137] "Just because you own property somewhere in the county does not ipso facto give you the right to object."[138] However, the

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[132] Gnau v. Seidel, 25 Md. App. 16, 332 A.2d 739, 744 (1975) (quoting Bryniarski v. Montgomery County, 247 Md. 137, 230 A.2d 289, 294 (1967)). The effect of this policy is that persons challenging an opponent's aggrievement must come forward with evidence of lack of damage when the opponent's property is quite close to the property addressed by the amendment. 332 A.2d at 744.

[133] 25 Md. App. 16, 332 A.2d at 745 (opponent located 700 feet from subject property was within the ambit of "adjoining, confronting or nearby"); Aubinoe v. Lewis, 250 Md. 645, 244 A.2d 879, 882 (1968) (property located 400 to 850 feet away but visible because of elevation). Latitude in this sense is consistent with the overall case-by-case approach of Maryland courts in decisions of who has been adversely affected by a zoning determination. Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289, 294 (1964).

[134] Wier v. Witney Land Co., 257 Md. 600, 263 A.2d 833 (1970); *see* Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289, 293-94 (1967) (to appeal, one must have been a party to the prior proceeding and must be aggrieved by its outcome); Burke, *supra* note 37, at 638-39.

[135] MISS. CODE ANN. § 17-1-17 (1972). This section provides that "any party aggrieved . . . shall be entitled to a public hearing before the governing body of the city . . . ." *Id.*, this language suggests that aggrieved persons living well beyond the subject property being rezoned would have a right to protest such rezoning. However, the statutes go on to suggest that there are some geographic or locational restrictions upon those who might protest a rezoning change:

> In case of a protest against such change signed by the owners of twenty per cent (20%) or more, either of the area of the lots included in such proposed change, or of those immediately adjacent to the rear thereof, extending 160 feet therefrom, or of those directly opposite thereto, extending 160 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of two-thirds of all the members of the legislative body of such municipality or county.

Id. The juxtaposition of the first and second sections results in some confusion. The latter explicitly refers to a protest by those from a specified area; the former implies no geographical limitations.

[136] 231 So. 2d 483 (Miss. 1970).

[137] *Id.* at 485 (owners failed to prove they were within the statutory class).

[138] *Id.*

following year the court changed its position and in doing so clarified some of the confusion regarding standing in zoning matters.[139] The court noted that section 17-1-17 places landowners within 160 feet of the subject property in a preferred class without prohibiting landowners who otherwise live in the area from protesting.[140] By using the phrase "in the area" the court permitted some ambiguity to remain with respect to the standing of protesting landowners.[141]

As previously stated, the spatial delineation of the neighborhood affected by a zoning amendment is a factor to be considered under the change or mistake rule. In fact, the rule in Maryland requires that the application of landowners petitioning for a change submit proof establishing "(a) what area reasonably constitute[s] the 'neighborhood' of the subject property, (b) the changes which have occurred in that neighborhood since the comprehensive rezoning, and (c) that these changes resulted in a change of character of the neighborhood." Whether or not zoning cases lend themselves so easily to definitions of neighborhood has been subject to some dispute.[142] For instance, it has been contended that consideration of a regional shopping center[143] in a rezoning matter "transcends the concept of 'neighborhood.' "[144] Although this argument is appealing, certainly the immediate land development impact of such a center is localized and, therefore, conforms to some extent to the concept of neighborhood. The concern should be with the facility's sphere of influence (*e.g.*, a retail trade area, a laborshed, or a market area), and with the immediate impact of the development upon the land use pattern of the area adjacent and within the general vi-

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[139] Rosenbaum v. City of Meridian, 246 So. 2d 539 (Miss. 1971).

[140] *Id.* at 541; *cf.* Clayton v. Prince George's County, 266 Md. 409, 292 A.2d 689, 694 (1972) (must be an area which reasonably constitutes the immediate environs of the subject property).

[141] *See* Largent v. Bridges, 247 So. 2d 703, 704 (Miss. 1971) (referring to landowners "in the area" but without offering any explanation).

[142] *See* N. WILLIAMS, *supra* note 5, § 53.20, at 404-06 (discussing opposition to the rule and problems of neighborhood determination); *see also* Montgomery v. Board of County Comm'rs, 263 Md. 1, 280 A.2d 901, 903-04 (1971) (discussing flexibility in neighborhood identification).

[143] *See* A. ARNOLD & J. KUSNET, THE ARNOLD ENCYCLOPEDIA OF REAL ESTATE 749 (1978) (distinguishing the regional shopping center from community and neighborhood shopping centers).

[144] Linowes & Delaney, *supra* note 49, at 120.

cinity of the subject property.

Maryland courts, implicitly recognizing the definitional problems associated with "neighborhood," have refrained from issuing strict guidelines for those faced with defining the term.[145] Although the lack of guidance allows flexibility in practice, it results in confusing claims of neighborhood area on the part of proponents and contestants of rezonings. Certainly, precise delineation has been a near impossibility. Another problem the Maryland courts encounter in defining neighborhood is inconsistency in use of the definition for standing and for showing substantial change. If a purpose of the substantial change in conditions rule is to protect neighborhoods from unnecessary zoning amendments, "it would appear logical to extend standing to any person who is within the neighborhood as defined by the owner of the rezoned parcel in his attempt to show substantial change."[146]

Aside from the issue of who generally has standing to challenge a rezoning effort, the Mississippi Supreme Court has not had to decide what in theory constitutes a neighborhood.[147] The court has continually referred to the need to show that condi-

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[145] For example of individual rulings, see Shore Acres Improvement Ass'n, Inc. v. Anne Arundel County Bd. of Appeals, 231 Md. 310, 247 A.2d 402, 403 (1968) (protestant was located 3760 feet from the subject property); Aubinoe v. Lewis, 250 Md. 645, 244 A.2d 879, 883 (1968) (property owners' homes were located from 400 to 850 feet from subject property); Wilkinson v. Atkinson, 242 Md. 231, 218 A.2d 503, 505-06 (1966) (protestant was located 750 feet from subject property but across an expressway; court denied standing). *See also* Clayman v. Prince George's County, 266 Md. 409, 418, 292 A.2d 689, 694 (1972) (neighborhood must be immediate); Woodlawn Area Citizens Ass'n, Inc. v. Board of County Comm'rs, 241 Md. 187, 216 A.2d 149, 156 (1966) (where property was on busy highway and at a "long distance," standing was denied).

[146] Burke, *supra* note 37, at n.59. *But see* Pattison v. Corby, 226 Md. 97, 172 A.2d 490, 493 (1961), wherein the court states that abutting or adjacent landowners are aggrieved and have standing to appeal but that the further away the protestant resides the more difficult is the decision. Problems in this area are well illustrated in Marcus v. Montgomery County Council, 235 Md. 535, 201 A.2d 777 (1964). There the court denied standing to two contestants residing, respectively, three-quarters and one quarter miles from the subject properties. A factor in the decision was that there was no evidence that the contestants' homes were within sight of the subject properties. A third contestant, residing one block from the subject property, was allowed standing. 201 A.2d at 779-80.

[147] But it is arguable that some development of the neighborhood concept is implicit in Rosenbaum v. City of Meridian, 246 So. 2d 539 (Miss. 1971), where a down zoning was sought for the erection of apartments. The rezoning was denied on the basis that the subject property was a "logical area of expansion" for an adjoining single family neighborhood. *Id.* at 540-42. In that the court upheld the denial, the "logical area of expansion" criterion may again be utilized.

tions in the neighborhood warrant a rezoning[148] or that there is a need to show substantial change of conditions in the vicinity of subject property,[149] but attempts to determine the extent of the affected neighborhood or area have had limited focus, generally dwelling upon whatever specific changes are alleged to exist in areas near a given piece of property.[150]

While the concept of neighborhood has been little developed by the Mississippi Supreme Court, the concept of change has received considerable attention in application of the rule. Questions of form and substantiality have predominated, and, not surprisingly, what is considered to be substantial change has varied according to the merits of each rezoning. A brief survey of actual findings by the court is illustrative. Predictably, completion of expressways or the expansion of streets to four lanes have been frequent bases of change determinations,[151] as has been increased traffic flow.[152] Furthermore, in *Harrison v. City of Jack-*

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[148] Gatlin v. City of Laurel, 312 So. 2d 435, 439 (Miss. 1975) (reference by the court to the need for proof of change in the character of the neighborhood but with no elaboration of the concept of neighborhood); Killibrew v. City of Gulfport, 293 So. 2d 21, 21-22 (Miss. 1974) (same); Miller v. City of Jackson, 277 So. 2d 622, 623 (Miss. 1973) (without testimony as to mistake in original ordinance or change in character of neighborhood doctrine of res judicata denied authority of rezoning ordinance); Board of Supervisors v. Roberts, 287 So. 2d 436, 437 (Miss. 1973) (trial court's judgment in favor of rezoning was reversed where neither record of case nor original petiton alleged any change whatsoever in character of the neighborhood); City of Jackson v. Bridges, 243 Miss. 646, 655, 139 So. 2d 660, 663 (1962) (there must be a showing of change and "[a]n organized neighborhood desire for rezoning, without more, is insufficient to justify rezoning") (quoting C. RHYNE, MUNICIPAL LAW § 32-2, at 823 (1957)).

[149] Hughes v. Mayor & Comm'rs, 296 So. 2d 689, 690 (Miss. 1974); Coleman v. Southwood Realty Co., 271 So. 2d 742, 743 (Miss. 1973); Paine v. Underwood, 203 So. 2d 593, 596 (Miss. 1967).

[150] Coleman v. Southwood Realty, 271 So. 2d 742, 743 (Miss. 1973) (changes in zoning of property adjoining and 1,100 feet north of subject property was sufficient to merit substantial change); Currie v. Ryan, 243 So. 2d 48, 52 (Miss. 1970) (commercial development across highway from subject property assisted in substantiating change); Paine v. Underwood, 203 So. 2d 593, 595-96 (Miss. 1967) (rezoning to commercial of property located within 500 feet together with commercial development across street was substantial change). *See also* City of Hattiesburg v. Pittman, 233 Miss. 544, 549, 102 So. 2d 352, 354 (1958) (refusal of city council to rezone to commercial lots abutting highway bypass practically deprived petitioners of the use of their property).

[151] Harrison v. City of Jackson, 253 So. 2d 535, 536 (Miss. 1971); City of Hattiesburg v. Pittman, 233 Miss. 544, 549, 102 So. 2d 352, 354 (1958).

[152] Harrison v. City of Jackson, 253 So. 2d 535, 536 (Miss. 1971); Adams v. Reed, 239 Miss. 437, 442, 123 So. 2d 606, 607 (1960). *But cf.* Hughes v. Mayor & Comm'rs, 296 So. 2d 689, 690 (Miss. 1974) (rezoning to commercial protested as aggravating already critical

son,[153] the court found that evidence of a mere intention to expand into four lanes an adjacent street sustained a finding of substantial change.[154] In *Hughes v. Mayor & Commissioners,*[155] however, the court reversed a rezoning decision despite the city's plan to alleviate traffic congestion by changing the highway interchange adjacent to the subject property.[156]

Substantial change has been held to be evident when nearby properties have been developed as commercial enterprises,[157] or even when nearby properties have been rezoned, but not yet developed, as commercial.[158] Change in density of residential land use is also looked upon by the court as a factor contributing to substantial change.[159] Related factors such as additional tax revenues,[160] expiration of restrictive covenants,[161] and public need[162] have lent indirect support to other variables in land use that directly represent physical change of conditions in the neighborhood. However, increased commercialization has been rejected as an indicator of substantial change in the character of an area when the rezoning amendment is an attempt to downzone, that is, when the new classification does not permit as high a level of intensiveness in use as the former classification.[163]

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traffic conditions; rezoning ruled invalid as no substantial change or mistake had occurred).

[153] 253 So. 2d 535 (Miss. 1975).

[154] *Id.* at 536.

[155] 296 So. 2d 689 (Miss. 1974).

[156] *Id.* at 690.

[157] Harrison v. City of Jackson, 253 So. 2d 535, 536 (Miss. 1971); City of Jackson v. Wilson, 195 So. 2d 470, 471 (Miss. 1966).

[158] Coleman v. Southwood Realty Co., 271 So. 2d 742, 743 (Miss. 1973); City of Jackson v. May, 193 So. 2d 555, 556 (Miss. 1967). *But cf.* Jackson v. Schwartz, 244 So. 2d 8, 10-11 (Miss. 1971) (proof showed that although surrounding property was zoned commercial, it actually consisted largely of one-family dwellings).

[159] Coleman v. Southwood Realty Co., 271 So. 2d 742, 743-44 (Miss. 1973); Harrison v. City of Jackson, 253 So. 2d 535, 536 (Miss. 1971). *But see* Jitney-Jungle, Inc. v. City of Brookhaven, 311 So. 2d 652, 654 (Miss. 1975) (construction of sixty-five additional homes in the area held not to support zoning change from commercial to residential).

[160] Adams v. Reed, 239 Miss. 437, 442, 123 So. 2d 606, 607 (1960).

[161] City of Jackson v. May, 193 So. 2d 555, 558 (Miss. 1967).

[162] City of Hattiesburg v. Pittman, 233 Miss. 544, 549, 102 So. 2d 352, 354 (1958) (need for sleeping accommodations supported rezoning from residential to commercial to permit hotel construction). *But cf.* Howie v. Autrey, 209 So. 2d 904, 905 (Miss. 1968) (proof that there was no need for a new shopping area was not determinative of rezoning to commercial).

[163] City of Jackson v. Shell Oil Co., 347 So. 2d 340, 340-41 (Miss. 1977).

The cases suggest that "substantial change" is inadequately defined as a result of each dispute being considered upon its own peculiar facts.[164] Thus, those factors combining to show substantial change in a particular case are given no greater or lesser weight on the basis of previous decisions. The evidence in each dispute should sufficiently support findings of substantial change, thereby making the rezoning order at least a debatable question.[165] While there is no guarantee that any one variable or set of variables will be sufficient to justify a rezoning,[166] local legislative bodies are entitled to take all factors into consideration. This point is clear from *Adams v. Reed,*[167] in which the Mississippi Supreme Court approved consideration of tax revenue needs, property value enhancement, and highway expansion, even though there was doubt that any one factor would be sufficient.[168]

The inclusion of tax revenue considerations in *Adams* is significant also as an indication of at least some willingness on the part of the court to accept non-physical reasons with the physical in substantiating a change in condition of the neighborhood. Yet, correct or not, it is still to be expected that physical factors will loom larger than socio-economic factors in determinations of substantial change.[169] The extent of flexibility that does exist is in keeping with the protean nature of the police power,[170] but much of the advantage is obscured through inconsistency in determinations of evidential sufficiency.[171] To be sure, however, consistency in the application of the substantial change portion

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[164] See note 20 *supra.*

[165] Harrison v. City of Jackson, 253 So.2d 535, 536 (Miss. 1971).

[166] *See* City of Jackson v. Gaddy, 241 So. 2d 364 (Miss. 1970), where the court concluded that even if the record revealed a material change, it did not follow as a matter of law that the property owners were thereby entitled to a rezoning. *Id.* at 365.

[167] 239 Miss. 437, 123 So. 2d 48, 52 (Miss. 1970).

[168] *Id.* at 442, 123 So. 2d at 607.

[169] Currie v. Ryan, 243 So. 2d 48, 52 (Miss. 1970) (viewing favorably the adequacy of a buffer strip); Blacklidge v. City of Gulfport, 223 So. 2d 530, 532 (Miss. 1969) (increased population and tourist trade); McKibben v. City of Jackson, 193 So. 2d 741, 744 (Miss. 1967) (bond issue for public facility); Ridgewood Land Co., v. Simmons, 243 Miss. 236, 250, 137 So. 2d 532, 537 (1962).

[170] *See* Maher v. City of New Orleans, 516 F.2d 1051, 1059 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)); Berman v. Parker, 348 U.S. 26 (1959); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[171] *See* 2 A. RATHKOPF, *supra* note 4, § 27.03, at 27-12 to -14.

of the rule is not being advocated herein; rather, a relaxation in general application is suggested.

VI. Key Differences in Application

There are several points of divergence between the Maryland and Mississippi applications of the change or mistake rule. Without question, the most prominent distinctions arise from Maryland's policy of not applying the rule to comprehensive rezonings[172] and floating zones. A floating zone is "a performance standard zone whose boundary is not specifically delineated on the zoning map. It is in the nature of a special exception, legislatively predetermined to be compatible with adjacent uses if specific standards are met."[173] Since the change or mistake rule is not thought to apply to special exceptions,[174] the Maryland court has been able to rationalize its continued use of the rule and its acceptance of the floating zone.[175] Although Maryland does not apply the change or mistake rule in a floating zone application, the legislative requirement of compatibility with the surrounding area forces an examination of the changing conditions in the vicinity of the requested floating zone.[176] A floating zone development is not entered on the zoning map unless upon review by the designated authority it is found compatible with zoning for the

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[172] See text beginning at note 191 *infra*.

[173] Linowes & Delaney, *supra* note 49, at 126 n.37. *See also* Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 Md. L. Rev. 105, 107-20 (1963) (the comprehensive plan allows for the establishment of small tracts for certain purposes, but the location is unspecified until a property owner makes application to reclassify his land for that use).

[174] *See* notes 39 through 42 and accompanying text *supra*.

[175] *See* Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751, 760 (1965) floating zone is analogous to special exception and change or mistake rule does not apply).

[176] *See* Aubinoe v. Lewis, 250 Md. 645, 244 A.2d 879, 883 (1968) (decisive determination is whether proposed development complies with purposes for which the floating zone was established, and these purposes are designed to ensure compatibility with existing uses); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83, 88 (1957) (zoning of small parcel is valid if in harmony with comprehensive zoning). There is one ironic by-product of the requirement of compatibility. It has been held that since the floating zone involves a legislative pre-determination of compatibility, the effect of a zone, once established, will not be considered as among factors of change in the neighborhood. This reasoning has allowed the court to close its eyes to the real impact of a floating zone. *See* Wahler v. Montgomery County Council, 249 Md. 62, 238 A.2d 266, 269 (1968) (since compatibility must exist it cannot be said rezoning is evidence of substantial change).

surrounding area.[177] Whether this review is legislative or administrative in nature has been open to dispute.[178]

The use of floating zone techniques in local zoning ordinances is advantageous in several respects.[179] A floating zone classification normally describes the nature of the district without providing for its location on the zoning map. It is not uncommon for a floating zone classification to provide for more stringent standards of development than is normally required in a comparable standard zoning classification.[180] With the floating zone, there is usually an attempt on the part of local zoning boards to require promoters to submit development proposals for the evaluation of positive and negative effects any development would likely have on surrounding property; whereas, the absence of a plan or a development proposal requirement in normal zoning amendment procedures results in planning boards not being able to make an adequate determination of the potential impacts of a proposed development. Indeed, it is expected that the usual request for a zoning change would not contain any specific devel-

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[177] *See, e.g.*, Costello v. Sieling, 223 Md. 24, 161 A.2d 824, 826 (1960) (trailer park is analogous to special exception and is not incompatible with residential district); 2 P. ROHAN, *supra* note 5, § 13.01[1], at 13-9 to -11.

[178] *See* Lutz v. City of Longview, 83 Wash. 2d 566, 520 P.2d 1374, 1376-77 (1974) (approval of floating zone application by zoning commission was impermissible delegation of legislative authority); 2 P. ROHAN, *supra* note 5, § 13.01[1], at 13-10 (eventual establishment of the zone is through the legislative body's amendment of existing regulations or promulgation of a new zoning plan).

[179] The floating zone technique, or some variation of it, is also used in other jurisdictions. The classic case of permitting a floating zone may be Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731, 96 N.Y.S.2d 58 (1951), in which both the amendment creating the procedures for allowing a floating zone and the first amendment establishing an apartment floating zone were challenged as being invalid. The Court of Appeals of New York noted that the procedures enacted to permit a floating zone were consistent with the goals of comprehensive planning for the village and that these procedures represented recognition that zoning is not static, but rather, is a process reflecting changing conditions in a community. Thus, the court concluded that the floating zone guidelines in the village zoning ordinance were responsive to the community's changing conditions and were in the public interest. *Id.*, 96 N.E.2d at 733, 96 N.Y.S.2d at 59. *See also*, Clark v. Town Council, 145 Conn. 476, 144 A.2d 327, 329 (1958) (floating zone used for shopping center); Donahue v. Zoning Bd. of Adjustment, 412 Pa. 332, 194 A.2d 610, 611 (1963) (apartment house district). *But cf.* Eves v. Zoning Bd., 401 Pa. 211, 164 A.2d 7, 10-12 (1960) (finding floating zone impermissible for lack of standards).

[180] *See, e.g.*, Raum v. Board of Supervisors, 20 Pa. Commw. Ct. 426, 342 A.2d 450, 453-54 (1975) (standards are of specific guide to planning bodies); Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751, 753-55 (1965) (detailed standards).

opment proposal.

The floating zone technique customarily provides for uses encompassing relatively large areas under single ownership or control that can be effectively evaluated by local officials to determine a development's compatibility with the surrounding area.[181] The officials making the evaluation of a floating zone proposal are likely to have greater combined experience in administering such regulations than the zoning board of adjustment that often administers a special exception procedure.[182]

It has also been noted that the floating zone concept may be used to implement inclusionary zoning policies designed to increase the supply of low cost housing.[183] One reported example of this is an inclusionary floating zone ordinance adopted by Lexington, Massachusetts.[184] This particular ordinance was enacted to facilitate the development of more subsidized housing units, while, at the same time, ensuring consideration and compliance of local planning standards and policies.[185]

Among the Maryland cases addressing the floating zone, *Huff v. Board of Zoning Appeals*[186] is especially interesting from a planning point of view. Supporting the compatibility of a floating zone request with a comprehensive zoning ordinance, the court observed:

> A zoning plan does not cease to be a comprehensive plan because it looks to reasonably foreseeable potential uses of land which cannot be precisely determined when the zoning is passed. In zoning of undeveloped areas, account can be taken of potential uses reasonably foreseeable, that is, . . . the undeveloped areas can be looked upon as a reservoir of future land uses.[187]

From this language, it can be inferred that the court is sympa-

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[181] 1 A. RATHKOPF, *supra* note 4, § 12.06[2], at 12-40 (4th ed. 1978).

[182] D. MANDELKER AND R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 713 (1979).

[183] H. FRANKLIN, D. FALK, AND A. LEVIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON EXCLUSIONARY LAND USE PROGRAMS 119-20 (1975).

[184] M. BROOKS, LOWER INCOME HOUSING: THE PLANNERS' RESPONSE 48-49 (1972).

[185] FRANKLIN, FALK, and LEVIN, *supra* note 183, at 120.

[186] 214 Md. 48, 133 A.2d 83 (1957).

[187] *Id.*, 133 A.2d at 90. Five acre tracts for light manufacturing scattered about undeveloped county areas constituted the comprehensive plan. *Id.*, 133 A.2d at 90.

thetic to this flexible planning device when dealing with largely undeveloped areas undergoing residential expansion. However, restriction of the floating zone to this context would inhibit land use planning unnecessarily.

The decision in *Huff* is also significant for its lenient attitude toward the administrative role in establishing floating zones. Here the planning commission and board of zoning appeals had wide discretion as to the creation of manufacturing tracts inside a zone of agricultural use.[188] Contestants alleged that this discretion constituted an improper delegation of legislative power. The court disagreed, holding that the ordinance had set out definite and specific standards, standards that were analogous to those accepted for special exceptions. The court announced further that administrative action need only meet a test of reasonableness.[189]

The Mississippi Supreme Court has not rendered an opinion as to the validity of the floating zone as a means of increasing flexibility in planning. But when amendatory use of the floating zone is contested, the court might perceive a conflict with requirements for a showing of mistake in the original ordinance or substantial change in surrounding conditions. If such a conflict is avoided or if the resolution is in favor of the floating zone, benefits will certainly flow from the ability to go beyond static districting. The result will be greater adaptability of local government to complex and subtle land use factors which perhaps will not even emerge until specific development proposals are submitted.[190]

The second prominent distinction between the manner in which the Maryland and Mississippi courts apply the change or mistake rule pertains to comprehensive rezonings. The Maryland courts, unlike those in Mississippi, distinguish comprehensive rezonings from other amendatory measures, with the result that comprehensive enactments—amendatory as well as original—benefit from the same strong presumption of correctness and reasonableness.[191] One seeking to remove his property from

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[188] *Id.*, 133 A.2d at 87.

[189] *Id.*, 133 A.2d at 90-92.

[190] Hector & Bangs, *Local Planning and Development Control: One Bad Apple Spoils the Barrel*, 1971 LAND USE CONTROLS ANN. 27, 30-31.

[191] Town of Somerset v. County Council, 229 Md. 42, 181 A.2d 671, 674 (1962); *see*

inclusion in a comprehensive rezoning is faced with an "onerous" burden[192] and may be required to show deprivation of any reasonable use.[193] Thus, under the Maryland view the change or mistake rule does not come into play where the issue is the initial validity of a comprehensive rezoning. Of course, where the dispute is over a piecemeal amendment to a previously enacted comprehensive amendment, change or mistake is the appropriate standard of review.[194]

While the quality of the presumption afforded comprehensive rezoning has long been settled, there was a brief period of uncertainty after a 1959 decision in which the Maryland Supreme Court assumed, without deciding, that the change or mistake rule did apply to comprehensive rezoning.[195] This doubt was erased one year later in *McBee v. Baltimore County,*[196] which set forth a cogent rationale for not applying the rule:

> Where the matter is studied comprehensively, the inquiry into time and space with respect to change is naturally more extensive than on single application. In short, the county commissioners were here exercising a plenary power, delegated by the General Assembly, to legislate a new zoning for the whole county. Hence the legislative body is not confined to a consideration of changes in the immediate neighborhood. The so-called "change or mistake" rule applicable to piecemeal rezoning cases . . . is not controlling here, because the new legislation is itself a comprehensive plan designed to cover a substantial area and to supersede the old zoning throughout that area. When such a new map is adopted, it is entitled to the same presumption that it is correct as is an original zoning.[197]

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also Valenzia v. Zoning Bd., 270 Md. 478, 312 A.2d 277, 280 (1973) (refusing landowner's request for change in comprehensive zoning where evidence may have permitted reclassification but would not have compelled it).

[192] Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d at 249, (citing Cabin John Ltd. v. Montgomery Co., 259 Md. 661, 271 A.2d 174 (1970)); Creswell v. Baltimore Aviation, 257 Md. 712, 264 A.2d 838 (1970); Wells v. Pierpont, 253 Md. 554, 253 A.2d 749 (1969).

[193] Roberts v. Grant, 20 Md. App. 247, 315 A.2d 103, 106 (1974).

[194] Town of Somerset v. County Council, 229 Md. 42, 181 A.2d 671, 674 (1962) (rejecting appellant's argument that presumption as to comprehensive zoning negated applicability of rule).

[195] Vestry of St. Mark's on the Hill Episcopal Church v. Doub, 219 Md. 387, 149 A.2d 779, 784-85 (1959).

[196] 221 Md. 312, 157 A.2d 258 (1960).

[197] *Id.*, 157 A.2d at 260.

Despite the clarity of *McBee,* the issue has not been immune from further litigation. Although there has been no real departure from the refusal to apply the rule in comprehensive rezonings, two cases in particular are worthy of mention. In *George F. Becker Co. v. Jerns,*[198] the court was faced with a comprehensive rezoning that, among other things, changed to industrial classification a nineteen acre tract virtually surrounded by residentially classified property. The resulting decision acknowledged that a newly adopted zoning plan would ordinarily constitute a comprehensive rezoning and thus enjoy the same presumption of validity as the original zoning, but stressed that this did not mean that all parts of the rezoning would necessarily be valid. The court could and did find that the treatment of the subject tract was in effect spot zoning. Since there was no showing of change or mistake, it was error to include this particular reclassification in the new plan.[199]

A second case in this vein is *Montgomery County v. Woodward & Lothrop, Inc.,*[200] in which contestants argued that a sectional amendment affecting forty-one acres of a twenty-two square mile planning area was nothing more than parcel-by-parcel piecemeal rezoning and, correlatively, that to escape change or mistake scrutiny, rezoning had to be related to policies for the entire planning area. The court rejected any notion that the area of an amendment and the area of a master plan must coincide. The forty-one acres was a substantial enough area to constitute comprehensive rezoning.[201] In arriving at this decision, the court stressed the need for flexibility. Determinations were not to be measured by acreage alone but rather were to "take into account the substantiality of existing and proposed land use within the area, the fact that the area rezoned embraces an entire political subdivision, population, intensity of development and whether the plan purports to address the common needs of a particular district."[202]

The Mississippi Supreme Court, on the other hand, applies the change or mistake rule with rigor whether a comprehensive

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[198] 230 Md. 541, 187 A.2d 841 (1963).

[199] *Id.,* 187 A.2d at 842-44.

[200] 280 Md. 686, 376 A.2d 483 (1977).

[201] *Id.,* 376 A.2d at 493.

[202] *Id.,* 376 A.2d at 493-94.

rezoning is at issue or not. In *City of Jackson v. Shell Oil Co.*,[203] the court found that the city under its new comprehensive zoning ordinance had no authority to change a property's classification from commercial to limited commercial absent a material change in the circumstances since the last rezoning.[204] Similarly, in *Underwood v. City of Jackson*,[205] the court held that rezonings require a showing of change or mistake and a showing of public need. Rezoning without such proof, held the court, constituted arbitrary and capricious action by the council.[206]

Automatic reliance upon the change or mistake rule as in *City of Jackson v. Shell Oil Co.* is but another needless step into intransigence. Whether or not the court would reconsider its position on the general application of the rule, the wisdom in holding it inapplicable to comprehensive rezonings is compelling. Without question, application of change or mistake analysis will discourage maintaining current plans and flexible land use regulations; whereas, adoption of the Maryland view of non-application would encourage local governments toward creative responses to ever evolving land use demands. The Mississippi statutes,[207] and indeed *Euclid*,[208] reflect the importance of a com-

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[203] 347 So. 2d 340 (Miss. 1977).

[204] *Id.*

[205] 300 So. 2d 442, 443 (Miss. 1974) (rezoning from residential A-1 to commercial).

[206] *Id.* at 443; *see also* Kirksey v. City of Jackson, 461 F. Supp. 1282, 1298 (1978) (rezoning requires showing of change or mistake; areas with black population were not miszoned as alleged).

[207] MISS. CODE ANN. § 17-1-9 (1972) provides:

> Zoning regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of buildings, and encouraging the most appropriate use of land throughout such municipality.

MISS. CODE ANN. § 17-1-11 (1972) provides:

> The governing authority of each municipality and county may provide for the preparation, adoption, amendment, extension and carrying out of an official plan, in whole or in part, for the purpose of bringing about coordinated physical development in accordance with present and future needs and may create, independently or jointly, a local planning commission, . . . with authority to prepare and propose (1) a master plan of physical development of the

prehensive plan to zoning regulations.[209] Thus, it appears that the courts would want to apply a flexible standard of review for amendments that revitalize the comprehensiveness of control which is at the very heart of the zoning rationale.

VII. Implications

For the foreseeable future, the impact of the change or mistake rule is likely to vary as the demography, geography and economy of the communities vary. Since Mississippi is largely rural,[210] most Mississippi zoning litigation of any variety develops in the Gulf Coast region, the Jackson metropolitan area and several other areas of increasing urbanization. Thus, it naturally follows that a continuation in present modes of application of the rule will be most painful in these vicinities.

Yet the rule's inconsistent results and static nature[211] pose significant problems for any area attempting to establish or maintain an ongoing planning process. Land use and development require a planning process and concomitant controls that have sufficient sensitivity to the complex and changing variables of progress. A standard of review for zoning amendments that is difficult to apply consistently and, because of this difficulty, is

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municipality or county, or part thereof; (2) a proposed zoning ordinance and map; (3) regulations governing subdivisions of land; (4) building or set back lines on roads and highways; and (5) recommendations from time to time to the governing authorities of each municipality or county with regard to the enforcement of and amendments to the proposals of the planning commission and resolutions or zoning ordinances of such authorities.

[208] 272 U.S. at 387-88. *See* note 10 *supra.*

[209] *See* Berry v. Embrey, 238 Miss. 819, 824, 120 So. 2d 165, 168 (1960) (municipal zoning ordinance must be in accordance with a comprehensive plan); Morris v. City of Columbia, 184 Miss. 342, 344, 186 So. 292, 293 (1939) (municipality must adopt a comprehensive plan before publication of intent to adopt zoning ordinance).

[210] The 1970 census indicated that Mississippi is 44.5% urban. U.S. Bureau of the Census, Dep't of Commerce, 1970 Census of Population, vol. 1, Characteristics of the Population, pt. 26 Mississippi, at 26-5 (1973).

[211] *See* Linowes & Delaney, *supra* note 49, at 124, stating that the necessity for proving change or mistake simply solidifies that status quo. For examples of inconsistency in application, see Chapman v. Montgomery County Council, 259 Md. 641, 271 A.2d 156, 158-61 (1971) (rezoning as per master plan did not meet substantial change test); Bosley v. Hospital for Consumptives, 246 Md. 197, 227 A.2d 746, 748 (1967) (larger residential population considered enough change for rezoning to commercial); Ellicott v. Mayor & City Council, 180 Md. 176, 23 A.2d 649, 653 (1942) (upholding spot rezoning for filling station even though there was no change since zoning).

applied intractably, is not readily amenable to flexible zoning regulations which represent new concepts in planning. This, then, is the heart of the controversy. The rule tends to thwart the local legislature's prerogative in rezoning by conditioning the validity of actions upon compliance with a standard that is too simplistic.[212] It is hardly undesirable that the police power be limited, but the change or mistake rule is too blunt a tool of restraint. An opinion of the Connecticut Supreme Court, *Malafronte v. Planning & Zoning Board,*[213] bears out this point. Expressing its uneasiness with evaluating amendments on the basis of change criteria, the court remarked: "[I]t is clear that this rule, which is a restriction on the principle of legislative discretion, will only be applied in those rare instances where the zoning amendment is patently arbitrary."[214]

It has long been recognized that zoning regulations must adapt to changing conditions.[215] Thus, it is difficult to support a rule of review for zoning amendments that ignores the facts of community dynamics and fails to recognize that this dynamism often extends beyond a few parcels of land or beyond a narrowly-defined neighborhood. It is essential also that the standards be responsive enough to permit timely remedial action. Long range planning can never be completely effective as conceptions of de-

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[212] *See* 2 A. RATHKOPF, *supra* note 4, § 27.03, at 27-12, stating: "The Maryland rule would appear to be a limitation upon the power of the legislative body to rezone, rather than a strict rule of presumption."

[213] 155 Conn. 205, 230 A.2d 606 (1967).

[214] *Id.*, 230 A.2d at 609.

[215] The following language from *Euclid* is prophetic:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, . . . which, . . . would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for which the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Euclid v. Ambler Realty Co., 272 U.S. 379, 387 (1926). *See also* City of Jackson v. Bridges, 243 Miss. 646, 654, 139 So. 2d 660, 663 (1962), (quoting C. RHYNE, MUNICIPAL LAW § 32-2, at 821-22 (1957) ("zoning is not static, and zoning restrictions are subject to change. Thus a municipality may amend its zoning ordinance whenever it deems conditions warrant such change.")).

sirable goals change.[216] In any event, planning solely for future physical development inevitably will suffer from lack of crucial data. This is recognized by the American Law Institute in its Model Development Code, which provides that land development plans must incorporate studies of population and other economic and social data.[217]

Certainly, the dynamics of community land use and development require a rule of review for zoning amendments that recognizes conditions of change other than those of a physical nature. If the change or mistake rule is to continue in force, courts must at least accept innovations in the philosophy and techniques of zoning as a strong indication of change.[218] As previously shown, courts in Mississippi on occasion consider economic and social factors in rezoning litigation;[219] however, recognition of these factors has not thus far led to extensive variations in employment of the rule. It would even seem that the prevailing strictness in application has precluded due consideration of key factors supporting amendments. The status of innovative planning and zoning concepts is therefore unclear.[220]

It is nevertheless plausible to anticipate an increased use in Mississippi cities of the floating zone and planned unit development,[221] itself a type of floating zone. While acceptance of these methods is to be encouraged, it seems unnecessary to follow the

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[216] See 5 P. ROHAN, *supra* note 5, § 33.02[1], at 33-42 n.6 (noting that some specialists prefer short term planning for specific objectives).

[217] MODEL LAND DEVELOPMENT CODE § 3-103.

[218] *See* MacDonald v. Board of County Comm'rs, 238 Md. 549, 210 A.2d 325, 342 (1965) (Barnes, J., dissenting) (change in conditions should include changes in ideas concerning zoning concepts and philosophy).

[219] See notes 54 & 91 *supra*.

[220] *See* 1 P. ROHAN, *supra* note 5, § 1.03, at 1-38 to -57 (probiding an overview of modern zoning methods such as cluster zoning, contract and conditional zoning, special purpose zones and time controlled zoning).

[221] Maxwell Huntoon defined a planned unit development as a housing project with these characteristics:

> [D]welling units grouped into clusters, allowing an appreciable amount of land for open space; much or all of its housing in townhouses or apartments, or both; higher densities than conventional single-family projects of the same acreage; [and] often, part of the land [is] used for nonresidential purposes such as shopping and employment centers.

M. HUNTOON, PUD: A BETTER WAY FOR SUBURBS (1971).

tenuous rationalization of the Maryland courts.[222] It is difficult to see fairness in holding that legislative acts "in the nature of special exceptions" may be accomplished without reference to the rule, while other changes are scrutinized by the simplistic and arbitrary criteria of change or mistake. There is no reason to suppose that amendments are more susceptible to abuse than special exceptions and variances.

It is apparent that planners, governmental officials, and courts look upon the floating zone as a flexible planning device of which local communities should avail themselves. The advantages gained in the use of the floating zone, however, certainly will be diminished if the courts use circuitous reasoning to uphold the technique while maintaining the validity of the application of the change or mistake rule. A far better alternative seems to lie in lessening the importance of the rule's application and increasing judicial recognition that community change should be evaluated in terms of what is in the best interests of the community.

Mississippi cities and counties will be faced with increasing complexity in land use problems, the solution of which will require increasingly sensitive zoning regulations.[223] Tension is especially likely in the urban/rural development context. This is the situation, fairly common in Mississippi, where the county is essentially rural except for one growing city. Forrest and Lamar counties in Mississippi present apt examples. Neither county has a zoning ordinance. Hattiesburg, located in both counties, is growing rapidly and urbanization is "spilling over" into rural areas of the two counties. Thus the urban and suburban development resulting from Hattiesburg's growth is both unplanned and chaotic. In the future, as the need for zoning in the two counties increases, the counties will require zoning regulations that can be applied with greater flexibility to the integration of new developments with old patterns of land use.

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[222] See notes 174, 175 and accompanying text *supra*. *See* Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?* 74 HARV. L. REV. 1552, 1566-72 (1961) (questioning the link between exceptions and the floating zone).

[223] *See* 1 P. ROHAN, *supra* note 5, § 1.03[1], at 1-39 (discussing the inadequacy of Euclidean zoning in dealing with urban sprawl and ecological concerns).

[224] For an overview of alternative policies, see Burke, *supra* note 37, at 649-57.

Another inevitable problem is that of a city or county with an outdated zoning ordinance. The ordinance and zoning map will at the very least need major revisions and may, in truth, beg for comprehensive rezoning. It is incumbent upon those applying the standards of review to these and other rezoning matters to ensure that those standards are sufficiently sensitive and varied to permit the legislative body to make determinations that maintain sensibility in overall land use and are in the public interest.[224]

The change or mistake rule is an outdated standard of review and its ill effects are compounded by unimaginitive application. After more than fifty years of zoning, it is recognized today by planners and well informed planning and zoning commissions that appropriate land use regulations coupled with responsible planning can provide for a compatible mixture of uses and development, thus accomodating community-wide desires and enhancing the public health, safety, and welfare. It is time to apply standards of review that are less restrictive than the change or mistake rule and broad enough to include the new concepts and techniques of planning and zoning.

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COMMENTS

Attorney Solicitation and the Threat of Bar Sanctions: A Hindrance to Justice for All?

With the United States Supreme Court's landmark decision in *Bates v. State Bar*[1] in 1977, advertising was opened to the legal profession as a legitimate means of expanding public access to legal services. Closely associated with advertising, and perhaps even properly classified under the same heading, is attorney solicitation of clients. Since advertising now has been established as proper and has been incorporated in many state codes of ethics,[2] solicitation, whether in-person or indirect in form, seems to be accepted as a commonplace practice in the legal profession.

This Comment will survey the several types of solicitation available to an attorney. Various arguments for and against allowing a more expansive practice of solicitation will be examined and then re-evaluated in light of recent cases and bar actions that delineate the present scope of permissible conduct. Finally, penalties imposed for violations of established standards will be reviewed.

I. Methods of Solicitation

A. Direct Activity or Authorization by the Attorney

The methods of attorney solicitation of clients are virtually unlimited in form and originality of scheme. Most methods, however, fall into several identifiable categories.

The most natural form of solicitation is direct activity. This

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[1] 433 U.S. 350 (1977). *Bates* for the first time held that a truthful advertising of routine legal services could not be prohibited by state action because of the overriding protection of the first and fourteenth amendments. *Id.* at 384.

[2] Mississippi remains one of the most conservative states on the issue of advertising. Under the Mississippi Code of Professional Responsibility, Canon 2, only the most routine legal services may be advertised and these are limited to newspapers. *See* Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation,* 30 Baylor L. Rev. 585, 611 (1978) (author stating that the conservative trend is to limit advertising narrowly to the *Bates* situation, noting Mississippi and Alabama as the most conservative states in this practice).

practice may in itself involve numerous types of action by an attorney to gain employment. "In-person" or one-on-one solicitation clearly falls within this category.[3] Similarly, the employment of an agent, commonly referred to as a "runner," to solicit clients falls within the category of direct solicitation.[4] Indirect remuneration of a person by an attorney also may be included within this classification.[5] In addition, payment for investigative services, whether regularly or specially hired, has in certain circumstances been classified as improper solicitation by an attorney.[6]

An interesting and more controversial area of direct solicita-

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[3] *See, e.g.*, Tonini v. State Bar of California, 46 Cal. 2d 491, 297 P.2d 1, 4-5 (1956) (attorney visiting injured persons following accidents and obtaining signed contracts for legal employment); *In re* Veach, 1 Ill. 2d 264, 115 N.E.2d 257, 260 (1953) (attorney personally asking permission to represent injured accident victims while also carrying employment contracts with him); *In re* Perrello, 260 Ind. 254, 295 N.E.2d 357, 360 (attorney found guilty of direct solicitation of clients in the hallways of a court building), *cert. denied*, 414 U.S. 878 (1973); Louisiana State Bar Ass'n v. Rutledge, 270 So. 2d 535, 539 (La. 1972) (attorney guilty of visiting in a hospital the husband of a victim of a recent train crash and giving him a card with the names of other clients with cases against the same railroad company); State v. O'Dowd, 158 Tex. 348, 312 S.W.2d 217, 218-19 (1958) (attorney guilty of setting up and using a system of soliciting lawsuits in workmen's compensation cases).

[4] *See, e.g., In re* Jones, 431 S.W.2d 809, 817 (Mo. 1966) (employment of an agent on a contingency fee basis to solicit cases); *In re* Vail, 228 A.D. 217, 239 N.Y.S. 414, 418-19 (1930) (employing and paying a third person to solicit negligence cases for legal practice); State *ex rel.* Oklahoma Bar Ass'n v. Martin, 410 P.2d 49, 52 (Okla. 1966) (eleven instances of persons being contacted by one other than the charged attorney and being requested to retain the attorney, fill out blank contract forms, or contact the attorney at a later time); *In re* Black, 228 Or. 9, 363 P.2d 206, 207 (1961) (attorney found guilty of 22 out of 27 charges of soliciting through use of paid "runners").

[5] *See, e.g.*, Linnick v. State Bar, 62 Cal. 2d 17, 396 P.2d 33, 35 (1964) (loans by attorney to a third person with no expectation of repayment of the money in return for referral of personal injury cases classified by the court as a "tacit working agreement"); *In re* Krasner, 32 Ill. 2d 121, 204 N.E.2d 10, 13-14 (1965) (referral of 70-75 cases over two and one half years by a friend held to be improper solicitation notwithstanding claim of attorney that he had paid a gratuity only).

[6] *See, e.g., In re* Thompson, 30 Ill. 2d 560, 198 N.E.2d 337, 341 (1963) (payment of almost $90,000 over six years to a nonprofessional person for supposedly investigative services when, in fact, such person referred cases to the attorney held to be improper solicitation); *In re* Frankel, 20 N.J. 588, 120 A.2d 603, 606 (1958) (attorney guilty of paying an investigator a twenty-five percent contingency fee for lawsuits brought to him supported with photographs).

Generally, investigative services must occur prior to the retention of the attorney and involve some type of aid in acquiring cases. *See In re* Mitgang, 385 Ill. 311, 52 N.E.2d 807, 815 (1944) (employment of investigator in personal injury case is not itself unethical and does not imply "ambulance chasing"), cited in Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 688 (1954) (author noting that investigators used solely to discover facts after an attorney has been hired is not unethical).

tion by an attorney involves the sending of letters. Almost all early cases on this subject held that the sending of form or personal letters constituted improper solicitation.[7] Because of the *Bates* decision, however, the attorney's intent in recommending legal services by mail has become significant. The recent decision by the Kentucky Supreme Court in *Kentucky Bar Association v. Stuart*[8] held that the mailing of letters by two attorneys to two real estate agencies advising the agencies of legal work connected with real estate transactions and offering fees for certain services was a proper form of legal advertising.[9] Relying on *Bates*, the court noted that, in the absence of pressure promoting a prospective client to make a hasty decision regarding legal advice, a letter stating prices for routine legal services was no different from the advertising allowed in *Bates*.[10] By validating letter advertising

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[7] *See, e.g.*, Florida Bar v. Curry, 211 So. 2d 169, 172 (Fla. 1968) (holding that an attorney, who was also an accountant, sending letters to some 800 clients for whom he had prepared income tax returns advising them that he was an attorney as well as an accountant and could represent them in estate and divorce proceedings was guilty of solicitation by mail); *In re* Nesselson, 35 Ill. 2d 454, 220 N.E.2d 409, 412 (1966) (mailing letters to clients whose names had been compiled in lists by paid informants held improper solicitation by attorney); Dayton Bar Ass'n v. Herzog, 173 Ohio St. 313, 181 N.E.2d 880, 881 (1962) (letters including a form to be signed and returned to the attorney that would authorize him to represent claimants in workmen's compensation suits).

The strictness that can be applied in this area is shown by *In re* Lee, 242 Or. 302, 409 P.2d 337 (1965). In *Lee* the attorney was charged with three separate offenses, one for the sending of a single letter to a couple injured in an auto accident. *Id.* at 338. Petitioner Lee argued that he had a casual acquaintance with the husband and merely offered advice "in appreciation for past favors." *Id.* Although the letter did not directly suggest legal employment, the court nevertheless held that improper solicitation had occurred. *Id.*

For a listing of early cases denouncing the use of letters and postcards to obtain legal business, see Note, *supra* note 6, at 687-88. The author points out that the link between the use of letters and the practice of law is a key one since letters may not be unethical if used for purely commercial purposes not related to the law practice. *Id.* at 688. Also of interest is an early case quoted by the author, *In re* Schwarz, 175 A.D. 335, 161 N.Y.S. 1079, 1083 (1916), which held that letter solicitation was a form of advertising, thus lending credence to the current belief that such conduct may be permissible under revised ethical canons today.

[8] 568 S.W.2d 933 (Ky. 1978).

[9] The Kentucky Bar Association had held that the letters violated Kentucky's Disciplinary Rule 2-103(A): "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." *Id.*

[10] 568 S.W.2d at 934. The Bar had argued that letter advertising promoted two evils: (1) a greater potential for overreaching and deceptive practices by unscrupulous attorneys and (2) making enforcement of ethical standards on advertising difficult if not impossible. The court noted, however, that deceptiveness would not necessarily increase as a result

the Kentucky court opened the door for many other forms of previously prohibited solicitation.[11]

Other methods of solicitation have been technically differentiated from the employment of a "runner," but encompass a similar activity in that a third person is in some way compensated. These methods have been alternatively described as fee-splitting,[12] payment of a salary to an agent,[13] and references made to

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of letter advertising and that in any event letters would provide a record for review to prevent abuse. *Id.*

[11] In light of the *Stuart* decision, one must now speculate whether earlier decisions such as that in Kentucky State Bar Ass'n v. Stivers, 475 S.W.2d 900 (Ky.), *cert. denied,* 406 U.S. 968 (1972) are still sound precedent. In *Strivers* the petitioner attorney, qualified to practice in both Indiana and Kentucky, had a form letter sent to residents to inform them of his qualifications to practice in both states. *Id.* at 902. A letter was sent to an auto accident victim that gave the attorney's phone number. *Id.* Stivers denied he had given final permission to send the letter and claimed that his conduct had been proper. *Id.* The court sustained a suspension from the practice of law and noted that use of his own letterhead implied that the letter had been sent with his knowledge. *Id.* at 903. Although Stivers cited in support of his argument the precedential decisions in Louisville Bar Ass'n v. Hubbard, 282 Ky. 734, 139 S.W.2d 773, 775 (1940) (attorney may solicit in certain proper ways when not taking advantage of a client) and *In re* Hubbard, 267 S.W.2d 743, 744 (Ky. 1954) (approving the earlier *Hubbard* case), his appeal fell on deaf ears as the court emphasized that he had nevertheless created litigation and had ignored Kentucky's ethical canons. 475 S.W.2d at 904.

Not all actions by an employee are held to bind an attorney to their unethical results. If no organized scheme is present and few people receive solicitation material, the attorney may be exonerated if he had no knowledge of his employee's acts. *In re* Seidman, 228 A.D. 515, 240 N.Y.S. 592, 596 (1930) (six solicited cases over five years did not prove attorney guilty of soliciting through his employees). If papers, checks, forms, or other tangible items exist to connect an attorney to the activity, the attorney may then be held to have notice of the activity and be subject to sanctions. *In re* Fieldsteel, 228 A.D. 470, 240 N.Y.S. 481, 491 (1930) (photostatic checks, blank retainers, and clippings held to be enough to impute knowledge of an employee's activities to an attorney). *See also* Note, *supra* note 6, at 688.

[12] Fee splitting involves payment to an agent who solicited a particular client of a certain percentage of the fee obtained by the attorney as a result. *See, e.g.,* Utz v. State Bar, 21 Cal. 2d 100, 130 P.2d 377, 381 (1942) (investigating firm specializing in locating unclaimed assets and estates retained same attorney to probate all estates of clients in return for a fee splitting arrangement; attorney in turn urged the clients to use the investigating firm); *In re* Randolph, 347 S.W.2d 91, 91-92 (Mo.) (attorney set up fee splitting arrangement with investigators who would contact personal injury victims and urge them to write the attorney a letter), *cert. denied,* 368 U.S. 916 (1961); Nebraska State Bar Ass'n v. Basye, 295 N.W. 816, 817 (Neb. 1941) (professional "ambulance chaser" receiving twenty percent of all fees collected plus expenses); *In re* Frankel, 20 N.J. 588, 120 A.2d 603, 606 (1958) (contingency fees paid to investigator).

[13] *See, e.g.,* Louisville Bar Ass'n v. Hubbard, 139 S.W.2d 773, 776 (Ky. 1940) (use of salaried chauffeur who investigated accidents, handed out professional cards, and visited homes of auto accident victims). *But see* Ashe v. State Bar of California, 71 Cal. 2d 123, 453 P.2d 737, 746-47, 77 Cal. Rptr. 233 (1969) (no disciplining of attorneys where salaried

an attorney by one other than a professional runner.[14] Doctors and hospitals,[15] insurance companies,[16] tow truck operators,[17] automobile repairmen,[18] clubs,[19] consultants,[20] and relatives of both the attorney and other clients have been employed by attorneys to furnish leads to prospective clients.[21]

Other solicitation devices do not require the compensation of third persons. Many such activities take the more subtle form of advancements. In such instances, courts often try to determine whether a monetary advancement was made to acquire a lawsuit or merely for some other unrelated purpose.[22] Motive and intent connected with the advancement have thus become primary factors in deciding whether any unethical activity has occurred.[23]

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investigator solicited clients without knowledge and authority of the attorneys).

[14] *See, e.g., In re* Moore, 8 Ill. 2d 373, 134 N.E.2d 324, 327-28 (1956) (attorney claiming he had made initial contact with an injured person when attempting to collect hospital bill and an assignment of hospital insurance with authority of the hospital).

[15] *See, e.g., Id.; In re* Glickman, 253 A.D. 275, 1 N.Y.S.2d 885, 886 (1938) (paying doctor to furnish clients from personal injury victims); *In re* Ariola, 252 A.D. 61, 297 N.Y.S. 100, 102-03 (1937) (brother of an attorney was an intern and referred ten cases to the attorney and his law partner in expectation of payment); *In re* Rothbard, 225 A.D. 266, 232 N.Y.S. 582, 584-85 (1929) (paying doctor for recommending clients).

[16] *See, e.g., In re* Schneider, 22 A.D.2d 231, 254 N.Y.S.2d 836, 838 (1964) (referral of business by insurance agent improper despite agent's relation to attorney and unawareness of impropriety involved); *In re* Cherry, 240 N.Y.S. 282, 285-87 (N.Y. 1930) (insurance claims referred to an attorney formerly employed by the insurance company).

[17] *E.g., In re* Marino, 29 A.D.2d 652, 286 N.Y.S.2d 652 (1968); *In re* Engelhardt, 20 A.D.2d 191, 245 N.Y.S.2d 611, 611 (1964).

[18] *See In re* Marino, 29 A.D. 2d 652, 286 N.Y.S.2d 652 (1968).

[19] *See In re* Rosenthal, 254 A.D. 771, 4 N.Y.S.2d 772, 772 (1938) (attorney using a member of an automobile club to acquire retainers from accident victims in return for compensation).

[20] *See* Columbus Bar Ass'n v. Agee, 175 Ohio St. 443, 196 N.E.2d 98, 101 (attorney dividing fees with workmen's compensation consultant who was the only such consultant listed in the telephone book's classified pages), *cert. denied*, 379 U.S. 7 (1964).

[21] *See, e.g., In re* Welch, 156 A.D. 470, 141 N.Y.S. 381, 385 (1913) (wife of victim of a railroad accident visiting hospital patients for attorney); Klensin v. Board of Governors of Pennsylvania Bar, 312 Pa. 564, 168 A. 474, 475-76 (1933) (father of attorney contacting injured persons and recommending son's services).

[22] *See, e.g.,* State *ex rel.* Florida Bar v. Dawson, 111 So. 2d 427, 430-31 (Fla. 1959) (advancements for funeral expenses, car repair, hospital bills, plus a guarantee of no cost for lawsuit if attorney lost the case held to be the buying of a lawsuit); *In re* Moore, 8 Ill. 2d 373, 134 N.E.2d 324, 328 (1956) (advancement of money to a client held not to be solicitation since done to achieve release of the client from jail on an unrelated charge where client was the sole witness to an accident in another case); People v. McCallum, 30 Ill. App. 3d 107, 173 N.E. 827, 831 (1930) (advancements to a client for living expenses during a personal injury case were proper and not unethical).

[23] Generally, if an advancement is made for a client's "subsistence" and not as an

The timing of the advancement is also an important element. Generally, advancements for subsistence made by an attorney either before or after his retention are not deemed to be improper solicitation.[24]

B. *Indirect Activity Through Group Sponsorship*

While the most common, and indeed the most offensive, form of solicitation by attorneys usually involves some direct sponsorship, whether it be in-person or through an agent, other practices have on occasion been classified as solicitation despite an absence of intent to solicit. Such instances usually involve an organizational or group effort to establish some type of legal assistance program to help solve particular problems associated with the group or its members. Labor unions,[25] civil rights activist groups,[26] and other political organizations[27] are examples of this phenomenon. Because these groups have presented the most perplexing issues associated with the ban on solicitation, they have

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inducement, then no solicitation has occurred. *See* Comment, *Advancements to Client By Attorney*, 17 ALA. L. REV. 313, 316-17 (1964-1965) (author noting subsistence payments truthfully based on need will not be considered improper unless inducing a potential client to select a certain attorney's services based upon an expectation of receiving such benefits).

Other considerations may transform an otherwise improper advancement into a proper one. *See* Hildebrand v. State Bar of California, 18 Cal. 2d 816, 117 P.2d 860, 863-64 (1941) (employment contract providing for payment of medical and hospital expenses by lawyer not improper since serving purpose of deterring unsatisfactory settlements).

[24] *See* Comment, *supra* note 23, at 317.

[25] Labor unions have been by far the most active group because of frequent physical injuries to union members. *See In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163, 166-67 (1958) (holding investigation of injuries and inducement to sign a contract allowing a regional counsel to handle all of a union's injury claims where a fixed percentage fee was charged for every suit, to be improper solicitation); Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728, 730-31 (1963) (ethical misconduct implied from attorney's allowing his name to be used at a union meeting, sent in written publications to members, and pasted on a union bulletin board); Cleveland Bar Ass'n v. Fleck, 172 Ohio St. 467, 178 N.E.2d 782, 785 (1961) (improper for attorney to appear at union meetings and agree to represent individual union members in workmen's compensation cases).

These decisions must now be re-examined in light of United Transp. Union v. State Bar, 401 U.S. 576 (1971), United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967), and Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964). See notes 94 through 109 and accompanying text *infra*.

[26] See notes 82 through 92 and accompanying text *infra*.

[27] See notes 108 through 121 and accompanying text *infra*.

provided the most progressive area for change. Nevertheless, serious questions remain concerning future bar discipline for both group-sponsored and in-person legal solicitation.[28]

II. Traditional Arguments for and Against Solicitation

Many of the arguments supporting the continuation of the ban on attorney solicitation have become associated with certain definitive phrases over the years. These arguments have been the subject of much debate among legal scholars. For purposes of organization, the various arguments and counterarguments may be grouped into two general categories: (1) harm to the client and (2) harm to the legal profession. Under each of these categories fall specific arguments outlining both the dangers inherent in legal solicitation and the beneficial results that may accrue from a lifting of the ban.

A. Harm to the Client

1. Overreaching

Overreaching is the solicitation of a client who cannot reasonably consider the retention of an attorney.[29] The evil associated with this practice is that a client is induced to pursue a lawsuit that he does not actually desire to maintain.[30] The most common example of this practice is in-person solicitation by an attorney at an accident scene, in a hospital setting, or at a time and place soon thereafter where the thought processes of the potential client are not clear.[31] Such a pressure tactic may be employed by the attorney himself or by his agent or runner.[32]

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[28] The main area of controversy surrounds the right of an attorney to solicit under the protection of the first and fourteenth amendments and the states' interest in protecting the public and the legal profession from the evils inherent in solicitation. See Part III, A *infra*.

[29] Comment, *Advertising, Solicitation, and Prepaid Legal Services*, 40 Tenn. L. Rev. 439, 451 (1973).

[30] Comment, *Ambulance Chasing in Illinois: A Success Story*, U. Ill. L.F. 309, 310 (1957).

[31] *Id.* See note 3 *supra* and the cases cited therein.

[32] *See, e.g.*, State *ex rel.* Florida Bar v. Dawson, 111 So. 2d 427, 430 (Fla. 1959) (advancements to a client may serve as an inducement for the client to pursue the suit); *In re* Randolph, 347 S.W.2d 91, 110 (Mo.) (investigators hired by attorney to persuade personal injury victims to contact the attorney held to be intentional and deceptive solicitation), *cert. denied*, 368 U.S. 916 (1961); *In re* Frankel, 20 N.J. 588, 120 A.2d 603, 612

Some critics of the ban on overreaching tactics have suggested that the harmful effects of an increased freedom to solicit through this method are at most speculative.[33] It is argued that if pressure tactics are used on a client, the client has a built-in remedy in his power to discharge the attorney at any time during the progress of the lawsuit.[34] In addition, the resentment engendered from being pressured into a lawsuit may prove to be less than the security obtained in having the matter in controversy placed in professional hands.[35] While these arguments may have some merit in that most misconduct through overreaching occurs even with strict limitations on solicitation and perhaps would not increase substantially with a relaxation of the rules, a complete lifting of all regulations on solicitation might have the effect of indirectly and unintentionally giving a nod of approval to pressuring techniques. Also, the free will of the client to terminate the lawsuit is not a satisfying remedy because of the dominating role an attorney plays in the attorney-client relationship. Once a case is filed and underway, expenses accrue immediately and additional pressures develop to prevent a client from stopping the process.[36] Finally, while some clients may be relieved at having a lawsuit filed by a supposedly competent attorney, the attorney may turn out to be incompetent and embarrassing to the client. Overreaching, therefore, remains an evil element in attorney solicitation.

2. Overcharging

A second argument against solicitation is that the abuse may

(1958) (Brennan, J., dissenting) ("The breeding of litigation through use of lay runners compensated by payment of sum contingent upon the recovery is an evil so vicious and so fraught with danger to the public interest that it has been classified as unprofessional conduct involving moral turpitude.").

[33] Comment, *supra* note 29, at 451-52.

[34] Comment, *A Critical Analysis of Rules Against Solicitation By Lawyers*, 25 U. CHI. L. REV. 674, 683 (1958).

[35] *Id.*

[36] If a client is susceptible to pressure exerted to persuade him to bring a law suit in the first place, one can well imagine the extent of his resistance to subsequent cajolery coupled with presentation of an itemized list of court costs and attorney expenses incurred to date. *See* Note, *Ambulance Chasing*, 30 N.Y.U.L. REV. 182, 186 (1955) ("Once the retainer is signed, the victim's choice of legal representation is, as a practical matter, determined.").

lead to excessive billing for the services rendered.[37] In fact, the higher fee may be caused by the solicitation itself.[38] Those advocating the opposite view have contended vigorously that open solicitation will reduce legal fees. Such claims are based on the supposition that increased competition among attorneys will lead to a reduction in fees and thus will benefit the public in the long run.[39] This theory has also been used to support the rationale for relaxing restrictions on solicitation for class action suits.[40] Increased competition in the legal market may indeed result in lower prices for routine legal services;[41] however, the same would not necessarily be true for complex litigation and suits that involve contingency fees.[42] If the benefits of competition outweigh the undesirable consequences of overcharging, they do not offset the other harmful effects of solicitation.

3. Misrepresentation and Underrepresentation

Another major harm arising from solicitation is the possibility of misrepresentation by an attorney to a client prior to being retained or underrepresentation by the attorney once employment has been secured. Misrepresentation is similar to overreaching in that the attorney is often guilty of "puffing" or of misleading the client about the results to be expected.[43] Misrepresen-

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[37] *See* Comment, *supra* note 34 at 683-84. *See also* Note, *The Solicitation Rule: Ethical Restrictions and Legal Fictions*, 22 CATH. U.L. REV. 218, 221 (1972) (author recognizing excessive fees as one of the traditional arguments for banning solicitation).

[38] Note, *supra* note 6, at 684 (author recognizing that among reasons offered against solicitation is its encouragement of higher fees by the attorney because of payments necessarily made to runners).

[39] Comment, *supra* note 29, at 452 (contending competition will balance out with overcharging practices); Comment, *supra* note 34, at 683-84 (competition resulting from solicitation may drive prices down; no evidence, however, showing a comparison between solicited fees and unsolicited fees).

[40] C. Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215, 222 (1976) (solicitation for class action suits may mean lower legal prices for all members involved).

[41] Such routine services as uncontested divorces, uncontested wills, estate cases and bankruptcy proceedings are prime targets for competition in the current advertising market. *See* Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1204-05 (1972).

[42] Competition will not likely reduce one's percentage under a contingent fee arrangement, especially if agents are used and drive up the initial cost of contacting the client. *See* Note, *supra* note 36, at 185.

[43] Comment, *supra* note 30, at 310 (noting that initial puffing tactics will often cause disappointment when monetary recoveries are obtained, reflecting blame not only on the

tation may also occur when the attorney professes to be a specialist in a particular area[44] or uses a related expertise to further his legal practice.[45] Underrepresentation generally refers to a lack of proper performance by the attorney on behalf of a solicited client. This may be a result of mere lack of interest or neglect by the attorney,[46] improper settlements for the client,[47] or simple incompetence.[48]

Despite the dangers of abuse stemming from these practices, the ban on solicitation has been attacked as an ineffectual deterrent. Indeed, one commentator has suggested that solicitation does not lead to misrepresentation but, on the contrary, aids the

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attorney responsible but also the entire legal profession).

[44] *See* Louisiana State Bar Ass'n v. Rutledge, 270 So. 2d 535, 539 (La. 1972) (attorney holding himself out as a specialist to out-of-state attorneys held to be an indirect solicitation of non-lawyers); *cf.* Code of Professional Responsibility, Disciplinary Rule 2-105 (concerning limitations of practice to special areas).

[45] *See, e.g.*, Florida Bar v. Curry, 211 So. 2d 169, 170 (Fla. 1968) (attorney soliciting specially for estate and divorce cases as an inducement to his alternate profession of preparing income tax returns as an accountant). *See also* R. Gygli & G. Larson, *Solicitation By and For Attorneys*, 15 CLEVE. MAR. L. REV. 244, 246-47 (1966) (authors discussing non-legal services combined in an attorney's office to create a "feeder" for legal business to the attorney and noting that attorneys cannot render two separate services at once without violating professional ethics).

[46] *See generally* Note, *supra* note 37, at 220; Comment, *supra* note 30, at 311.

[47] *See, e.g., In re* Veach, 1 Ill. 2d 264, 115 N.E.2d 257, 258 (1953) (lawyer betrayed clients by persuading them to accept quick settlements far below amounts to which they would ordinarily be entitled); Comment, *supra* note 30, at 311. The author mentions the use of the "package deal" in settlements whereby an attorney may settle several suits with one insurance company and make a subjective dispersal of the assets to clients as the attorney feels they will accept without objecting to the amount as too low. *Id. See generally* Comment, 47 NW. U.L. REV. 895, 904 (1953).

In the area of class actions it has been argued that an improper settlement will not occur by virtue of the protection provided by Fed. R. Civ. P. 23(e), which requires court approval of proposed settlements and notice of compromises among all parties. Schoor, *supra* note 40, at 229-30.

[48] *See* Note, *supra* note 37, at 221. The author contends that the assumption that attorneys who solicit are incompetent is false. He admits that some indeed are, but argues that permitting solicitation would increase the number of available competent attorneys to the public. *Id.*

The argument is also made that advertising and soliciting will prompt a person to choose an attorney rather on the basis of attractive advertising and blandishments than on the basis of an attorney's legal ability. *See* State v. Nichols, 151 So. 2d 257, 268 (Fla. 1963) (concurring justice noting that competitive solicitation may deceive an already susceptible public and will injure the dignity of the profession); Comment, *supra* note 41, at 1184-85 ("[T]he performance of the legal profession might be weakened by the tendency of the public to choose attorneys on the basis of their advertising programs rather than their professional competence.").

client who may be uncertain as to how to proceed with a claim or whom to contact;[49] thus, the allegation that an attorney who solicits has less interest in a client's cause is without merit.[50] Other writers have suggested that inadequate representation is more effectively prevented by other laws concerning fraud and civil liability for negligent performance than by a prohibition on all soliciting activities.[51] Even though these propositions may be valid, the chances of abuse through solicitation remain great. This seems especially true when one considers the potential mass settlement systems that might develop in legal offices merely to maximize the annual caseload and resulting settlement fees. The client's interest would hardly be served by such a system. The possibilities of attorneys' neglect may also be greater in these situations. Furthermore, disgruntled clients are more likely to blame the entire legal profession for unsatisfactory performances than merely the individual attorneys with whom they have been directly involved—a grim prospect when viewed in the context of the already plummeting public confidence in the profession.

4. Public Goals

Solicitation by attorneys deeply involved with particular public causes could also impinge upon a client's interests. In this situation the attorney probably will not be lacking in competence or interest in the case; however, his priorities may shift from a vigorous prosecution of the suit to a public vindication of some social, political, or moral principle.[52] In this event, the client's pecuniary interest may suffer if the attorney effects a compromise that accomplishes his public goal but leaves the client without adequate compensation.

More often than not, however, socially-motivated attorneys will provide adequate representation to their clients and to the public as well. This is especially true when the legal services

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[49] Comment, *supra* note 34, at 684.

[50] *Id.*

[51] Comment, *supra* note 29, at 452; Comment, *supra* note 48, at 1188.

[52] Note, *Legal Ethics—Advertising and Solicitation by Public Interest Law Firms*, 51 TEX. L. REV. 169, 171 (1972) (attorneys may seek their own social goals and ends regardless of the concern or desire of the client). *But see* Note, *supra* note 37, at 221 (author asserting that soliciting lawyers will not necessarily place client interest second to their own interest).

offered are free and benefit the public as a whole. A good example is the experiment conducted by the Stern Community Law Firm in which free legal services were advertised concerning child adoption procedures and potentially harmful toys on the market.[53] Instead of being condemned as improper solicitation, the advertisements were praised as exemplars of good taste and sound discretion.[54] Thus, the impropriety of solicitation based upon the public goals of an attorney is subject to a variety of independent variables which determine whether or not an ethical violation has occurred.

B. Harm to the Profession

1. Stirring Up Litigation

The stirring up of litigation has long been considered a detrimental side effect of solicitation.[55] This view is based on the theory that an aggrieved party should not pursue a remedy for a wrong in the courts unless he is so aggrieved that he would have initiated the action himself.[56] Implicit in this theory is an assertion of the need to reduce the caseload before the courts and thus create a more effective judicial system.

However, since courts have an affirmative obligation to redress legitimate grievances notwithstanding the weight of the caseload, the possibility of a more congested court calendar has been dismissed as a justification for a continued ban on solicitation by attorneys.[57] Some critics have argued that requiring indi-

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[53] In the Matter of Advertising Conducted by Monroe H. Freedman and the Stern Community Law Firm, Report of the Committee on Legal Ethics and Grievance of the Bar Association of the District of Columbia (1971).

[54] *Id. See* Comment, *Group and Other Legal Services For the Middle Class,* 10 SAN. DIEGO L. REV. 333, 344 (1973) (author discussing the Stern Community Project and stating that the good judgment and discretion of attorneys are adequate protection against the abuses of legal advertising when coupled with laws imposing civil liability for fraud and poor attorney performance).

[55] *See generally* Note, *supra* note 6, at 684 (author lists five reasons against permitting solicitation, including the breeding of litigation); Comment, *supra* note 48, at 1184 (stirring up litigation listed among five reasons for prohibiting solicitation).

[56] Comment, *supra* note 29, at 450 (author stating that this is still the modern view). *But see* Comment, *supra* note 34, at 676-77 (commenting that if the correct theory is to maintain peace until one sues on his own behalf, then solicitation bans are justified; but if a court function is to "enforce all valid claims," then stirring up litigation is good for meeting this end).

[57] Note, *supra* note 37, at 222-23 (stating that more litigation is needed to satisfy the

viduals to pursue lawsuits on their own initiative constitutes discrimination against poor, ignorant, and timid persons and that a passive judicial system would not serve these classes adequately or equally.[58] Others have suggested that solicitation might be permissible in some cases, but not in cases involving marital or probate matters.[59] Almost all supporters of solicitation conclude that it is needed today to ensure adequate awareness of legal opportunities to all people regardless of any increase in court congestion that may develop. Unique features of modern society such as urbanization and sophisticated advertising techniques have been adduced to support this conclusion.[60]

These arguments for permitting solicitation despite the danger of stirring up litigation are valid when balanced against the fear of overcrowding the courts. That the need for awareness of proper legal remedies outweighs any added burden to court dockets is evident if considered in the context of the increasing complexity of modern society. Prevention of discriminatory effects is an additional desideratum that favors equalizing awareness among the public of available legal services. However, constant vigilance is necessary to deter overreaching by attorneys that could result in the harassment of potential clients. While the public should be kept aware of the availability of attorneys, clients should still make the initial decision whether to seek a remedy in court.

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obligation of the courts). *See* Comment, *supra* note 29, at 450 (suggesting that courts can and should deal with the problem). *See also* Schoor, *supra* note 40, at 221 (commenting that while solicitation of class actions may increase litigation, the advantages to the court system should take a second place to justice for clients).

[58] Comment, *supra* note 29, at 450. *See* Comment, *supra* note 48, at 1189 (suggesting that the archaic idea that litigation should arise only when one pursues a remedy free from outside pressure benefits the wealthy, intelligent, and aggressive people to the exclusion of the poor, timid, and ignorant); Comment, *supra* note 54, at 340 (stating that the public is either ignorant of a need for legal services or unable to find competent attorneys because of ethical limitations such as those on solicitation).

[59] Comment, *supra* note 34, at 677-78 (suggesting that marital suits and probate matters are not good targets for solicitation but that a better reason to permit solicitation would be to enforce certain laws and to address significant issues or policies).

[60] Note, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. Rev. 483, 500 (1974). Pointing out that the manner of selecting an appropriate attorney has changed over the past one hundred years as evidenced by urbanization, advertising techniques employed by other businesses, and lack of personal knowledge about attorneys, the author concludes: "To expect people to pursue a completely self-reliant course in seeking out and securing the services of lawyers may be asking too much . . . ." He also questions anti-solicitation rules even for small town situations. *Id.*

2. Fraudulent Claims

The likelihood of an increase in litigation has led many to believe that there would be a commensurate rise in the number of fraudulent claims,[61] encouraging the production of manufactured evidence and the subornation of perjury.[62] Opponents of this position simply contend that no proof exists to show that solicitation increases the frequency of fraudulent claims or that solicited claims are less likely to be valid.[63] However, solicitation may indeed augment the number of fraudulent claims since an attorney can assure a client making such a claim that he will have professional assistance in bringing the action.[64] Solicitation may therefore make it easier for a dishonest lawyer to meet a dishonest claimant, thus giving the lawyer access to police, doctors, and hospital attendants who may be willing to fabricate evidence.[65] The rise in fraudulent claims, however, appears to depend on the intent and desire of individual attorneys. One may argue that attorneys who choose to practice dishonestly will do so in spite of anti-solicitation regulations. Nevertheless, a liberalizing of restrictions will make manipulative and dishonest activities more attractive and tempting, thereby facilitating the prosecution of fraudulent claims.

3. Corruption of Public Officials

Closely related to a proliferation of fraudulent claims is a rise in corruption of public officials. Such corruption can occur when officials receive payoffs for information and services while acting as informants.[66] It has been argued, however, that the ban on solicitation is only an indirect method of preventing this practice and is therefore not justified.[67] A better solution is the direct enforcement of existing laws against corruption in public office.[68]

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[61] A number of scholars have included this item in their lists of harmful effects of solicitation. *See, e.g.*, Comment, *supra* note 48, at 1184; Comment, *supra* note 34, at 679; Note, *supra* note 37, at 223.

[62] Note, *supra* note 37, at 223.

[63] Comment, *supra* note 34, at 679; Note, *supra* note 37, at 223.

[64] Comment, *supra* note 34, at 679.

[65] *Id.* at 680.

[66] *Id.*

[67] *Id.* at 681.

[68] *Id.*

Corruption of public officials is not so inextricably connected with the permissibility of solicitation as to justify prohibiting solicitation on that basis alone.

4. Competition for Clients

An increase in competition among attorneys as a result of solicitation has been cited as both beneficial and harmful.[69] Critics fear that open competition for clients would lead to a shift in emphasis from community service to profit-making.[70] Additionally, attorneys who choose to solicit may gain an unfair advantage over those who choose not to.[71] Others argue that current limitations on solicitation merely preserve a competitive edge in favor of those with the bulk of legal business,[72] that solicitation will create a healthy competitive atmosphere between large and small law firms[73] and will aid young attorneys in establishing themselves.[74] Such competition may reduce the costs of legal services to the public rather than inspire a profit-oriented profession.[75]

5. Diminished Status and Reputation

A residual harm to the legal profession as a result of solicitation involves a potential loss of the status accorded to the practice of law. This problem is often mentioned in connection with the lack of public confidence in the profession.[76] Advertising and solicitation are viewed as reducing the prestige of and the respect for the legal profession since they encourage the vulgar pursuit of economic gain.[77] Yet, it has been pointed out that since the public itself is known to strive for economic enhancement no less should

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[69] See notes 38 & 39 and accompanying text *supra*.

[70] Note, *supra* note 6, at 684.

[71] *Id.* *See also* Note, *supra* note 37, at 225.

[72] B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS, SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 148-50 (1970).

[73] Comment, *supra* note 29, at 454.

[74] Comment, *supra* note 34, at 682.

[75] See note 39 and accompanying text *supra*.

[76] *See In re* Krasner, 204 N.E.2d 10, 15 (Ill. 1965) (court condemned solicitation because it created disrespect for the legal profession and unsavory competition). *See generally* Comment, *supra* note 29, at 453.

[77] *See* Comment, *supra* note 48, at 1190 (author stating that any bad reputation of the profession rests with the inefficiency of attorneys rather than with solicitation itself).

be expected of attorneys.[78] Some also argue that disrespect for an individual attorney does not lead to disrespect for the legal profession in general.[79] Increased effectiveness, it is contended, would offset any drop in public confidence.[80]

III. Expanding Solicitation under the First Amendment

The right of free expression under the first and fourteenth amendments has provided the primary basis for any relaxation of traditional bans on solicitation by attorneys. In two recent decisions,[81] the United States Supreme Court considered the problems of in-person and group-sponsored solicitation in the context of that right. The decisions have had varying effects regarding the permissible extent of attorney participation in such activities. The case law preceeding these decisions illuminates the Court's expanding tolerance of solicitation demonstrably conducive to the needs and welfare of the public.

A. Background First Amendment Cases

In 1963 the Supreme Court decided the first of four cases that permitted a broad scope of activity in the field of solicitation for group legal services. In *NAACP v. Button,*[82] the Court considered whether the Virginia Supreme Court could exercise control over and limit the activities of the NAACP in seeking potential litigants for race discrimination cases.[83] The Court found that the applicable state statutes unconstitutionally restricted the freedom of expression and association guaranteed by the first and fourteenth amendments[84] and held that the actions taken by the NAACP were a protected form of political expression.[85] In arriv-

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[78] Comment, *supra* note 34, at 681.

[79] *Id.* at 681-82.

[80] Comment, *supra* note 29, at 453.

[81] *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

[82] 371 U.S. 415 (1963).

[83] *Id.* at 418-19.

[84] *Id.* at 428-29.

[85] The Court stated:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.

Id. at 429.

ing at this decision, the Court established a "compelling state interest" standard for limitations on first amendment freedoms.[86] It also noted the absence of those dangers historically associated with solicitation.[87]

Initially, the *Button* decision was thought to be limited in scope because of the Court's use of the term "political expression."[88] In addition, three Justices dissented from the majority opinion[89] and one Justice concurred in part and dissented in part.[90] The dissent strongly urged that states should regulate solicitation initiated by lay groups such as the NAACP.[91]

The following year the Court dismissed a restrictive interpretation of *Button* in *Brotherhood of Railroad Trainmen v. Virginia.*[92] There the Supreme Court addressed the issue of the Brotherhood's right to retain attorneys who could be recommended to members and their families for personal injury or wrongful death cases arising out of railroad work.[93] The Court

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[86] The Court held that a state could not use professional misconduct as a justification for ignoring constitutional rights. *Id.* at 438-39. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 297 (1961) (regulatory measures, despite sophisticated form, cannot be used to limit first amendment rights and their exercise); *see* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("[W]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

[87] The Court remarked the absence of such common dangers as conflicts of interest, pecuniary interest and improper competition. 371 U.S. at 443.

The Court further indicated that nonpecuniary solicitation of legal business had often been upheld, and cited as support: *In re* Ades, 6 F. Supp. 467, 477 (C.D. Md. 1934) (attorney volunteering services to a client without being initially requested held permissible and not unethical where "important issues" were at stake) and Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602, 610 (1940) (upholding representation by local bar association of victims of loan sharks free of charge). 371 U.S. at 440 n.19.

However, the Court did take notice of several harmful effects of solicitation: causing family discord, harassment of companies with claims and oppression of debtors. *Id.* at 441.

[88] *See* Comment, *supra* note 29, at 442.

[89] Justices Harlan, Clark, and Stewart dissented, with Justice Harlan writing a lengthy rebuttal to the majority opinion. 371 U.S. at 448.

[90] Justice White concurred with the proposition that a state should not attempt to control certain activities by a lay entity such as advising one of his rights, urging members to sue, recommending certain attorneys, or financing a lawsuit. He indicated, however, that a lay group such as the NAACP should not be permitted to practice law and run the litigation. This type of activity should be subject to state control. *Id.* at 447-48.

[91] Justice Harlan emphasized the control the NAACP had over the litigation and the staff attorneys. *Id.* at 449. *See* Comment, *supra* note 29, at 443 (listing four areas of control mentioned by Justice Harlan).

[92] 377 U.S. 1 (1964).

[93] *Id.* at 4. When a worker was killed or injured, his lodge secretary would contact him or his family and recommend that the potential claim not be settled without first seeing

held that the legal assistance provided by the Brotherhood was constitutionally protected,[94] and concluded that the state had failed to establish a compelling interest sufficient to justify a limitation of group-sponsored legal services.[95]

In *Railroad Trainmen,* the group legal service provided by the union did not involve political expression. Focusing on this point, the dissent distinguished *Button* as unreliable precedent for personal injury cases.[96] However, the Court pointed out that in *Button,* attorneys had been employed directly by the NAACP as opposed to the indirect method of employment used by the union in *Railroad Trainmen,*[97] suggesting that any evils inherent in the Brotherhood's practice were less pernicious than those in *Button.*[98] Thus, *Railroad Trainmen* established first and fourteenth amendment protection for group-sponsored solicitation, an area certainly beyond the pale of political expression.

Several years later the Court expanded even further the permissible scope of solicitation by organizations in *United Mine Workers v. Illinois State Bar Association.*[99] There the union had retained an attorney on a salaried basis to represent union members desiring his services in workmen's compensation cases.[100] The Illinois Supreme Court had interpreted *Railroad Trainmen* as protecting those plans under which workers were referred to an attorney for consultation rather than those involving attorneys

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a lawyer, who was always the attorney maintained by the Brotherhood in that particular area. *Id.* The Brotherhood admitted that under this plan it had recommended particular attorneys to handle the claims. *Id.*at 5.

[94] *Id.* at 6. The Court commented that the activity here was not of the type that could either impede the administration of justice or impair ethical standards. *Id.*

[95] *Id.* at 8.

[96] *Id.* at 9-10 (Clark, J., dissenting). The dissent openly attacked the majority opinion as ending legitimate state regulation of the legal profession and reducing legal practice to a mere commercial enterprise. *Id.* at 9.

[97] *Id.* at 7.

[98] *Railroad Trainmen* presents a strong case for permissive solicitation for group legal services because the Court indicated that substantive evils from solicitation must be present to justify any state regulation. *Id.* at 8. *See* Comment, *supra* note 29, at 444 (stating that the only apparent reason no compelling state interest was found in *Railroad Trainmen* was Virginia's failure to produce evidence that the union activity was harmful to the public or the profession).

[99] 389 U.S. 217 (1967).

[100] *Id.* at 219. The union plan included forms for members to fill out and send to the Union's legal department. *Id.* Members, however, were free to consult with any outside attorney and often were encouraged to do so by the Union attorney. *Id.* at 220.

explicitly hired by the union;[101] it had also viewed *Button,* in which the attorneys recommended to members were actually employed by the organization, as limited to litigation involving political expression.[102] However, the United States Supreme Court rejected any narrow interpretation of either case and held that the first and fourteenth amendments protected the right of an organization to hire an attorney to assist organization members in lawsuits.[103] The dissent once again asserted the necessity of regulating activities of the legal profession in which more than speech was involved.[104]

After *Illinois State Bar* the Court reaffirmed its tolerance of group-related solicitation in *United Transportation Union v. State Bar of Michigan,*[105] in which the Court held that a union recommendation to its members of an attorney who would charge a fee not greater than twenty-five percent of the recovery was group legal action protected by the first amendment.[106] It has been suggested that since the case did not involve an explicit financial connection between the attorney and the union, *United Transportation* presents a less compelling justification for group solicitation than *Illinois State Bar.*[107] Nevertheless, *United Transportation* strengthened the legitimacy of group legal services and related attorney solicitation. It did not address, however, the extent to which similar activities by various other organizations would be permitted; this question was partially answered by a 1978 Supreme Court decision.

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[101] *Id.* at 221.

[102] *Id.*

[103] *Id.* at 221-22. The Court found no inherent evils often associated with solicitation in the Union system. *Id.* at 224. It noted that the many years of use of the Union plan had seen no instance of abuse, injury to a client, or harm to the legal profession. *Id.* at 225. *See* Comment, *supra* note 29, at 445 (discussing *Illinois State Bar* and noting the Court's finding that individual rights outweighed state interests in regulation).

[104] *Id.* at 226 (Harlan, J., dissenting). In dissenting, Justice Harlan stated, "However, litigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression." *Id.*

[105] 401 U.S. 576 (1971).

[106] *Id.* at 580.

[107] Comment, *supra* note 29, at 446 (noting that *United Transportation* is a weaker case than *Illinois State Bar* for supporting collective activity and commenting additionally that the state statute found invalid in *United Transportation* was vague, leading to an easier application of first amendment protection).

B. Primus *and the Status of Group Legal Services*

In re Primus,[108] one of two decisions by the U.S. Supreme Court in 1978 concerning solicitation, involved bar discipline against an attorney engaged in group-sponsored legal action.[109] In *Primus* the leader of a local organization serving indigents invited an ACLU attorney to a meeting of women who had been sterilized or threatened with sterilization as a condition of their continued receipt of Medicaid benefits.[110] At the meeting the attorney discussed the women's rights and the possibility of a lawsuit on their behalf.[111] Subsequently, the attorney was notified that one of the women wished to bring a suit against the doctor who had sterilized her, and the attorney responded with a letter offering her free legal representation by the ACLU.[112] The South Carolina Supreme Court found the attorney guilty of violating bar canons and disciplinary rules,[113] and publicly reprimanded the attorney.[114]

In reversing, the United States Supreme Court held that Primus' actions were constitutionally protected.[115] The first important point was that Primus' solicitation had been an offer of free representation rather than one leading to pecuniary gain for the attorney.[116] This fact removed the problems connected with commercial speech, the resrictions on which are accorded a lower level of judicial scrutiny.[117] The South Carolina court had at-

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[108] 436 U.S. 412 (1978).

[109] *Id.* at 414-21. The attorney, Edna Smith Primus, was associated with a Columbia, South Carolina law firm, and was also an unpaid officer of and lawyer with the local branch of the ACLU. *Id.*

[110] *Id.* at 415.

[111] *Id.* at 416. The appellees conceded that this meeting and discussion were constitutionally protected. *Id.* at 426 n.17.

[112] *Id.* at 416. The woman was subsequently dissuaded by the doctor from filing suit, but another woman pursued her suit. It was the letter to the first woman, however, which became the centerpiece of the disciplinary proceedings. *Id.* at 416-17.

[113] *Id.* at 417-21. The rules in question were DR 2-103(D)(5)(a) and DR 2-104(A)(5) of the Supreme Court of South Carolina. 436 U.S. at 418.

[114] 436 U.S. at 421. The action by the South Carolina court was actually an affirmation of action taken by the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. *Id.* at 417-21.

[115] *Id.* at 431.

[116] *Id.* at 422.

[117] *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 n.24 (1976) (Court not willing to hold that commercial speech is accorded the same level of protection as political speech).

tempted to circumvent this argument by pointing out that the ACLU, unlike the NAACP in *Button,* offered legal services as its primary purpose, and thus was similar to an ordinary law firm.[118] The court had also relied on the fact that the ACLU regularly included requests for attorneys' fees in its complaints.[119] The Supreme Court dismissed these arguments by pointing out the history of the ACLU as a proponent of civil rights[120] and the ACLU's status as a *bona fide* non-profit organization.[121] The Court also stressed that neither the ACLU nor Primus would have shared in any recovery of monetary damages.[122]

Secondly, the Court determined that Primus' actions were forms of political expression and association which are accorded the highest level of constitutional protection.[123] In reaching this decision, the Court relied heavily on *Button* and three other cases[124] which had extended the protection in *Button* to labor unions maintaining suits on behalf of their members.[125] Although the ACLU and the NAACP are basically political groups, as opposed to the unions in the other cases, the *Primus* decision emphasizes the recurrent theme that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[126] The Court

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[118] 436 U.S. at 427. *See In re* Primus, 268 S.C. 259, 269, 233 S.E.2d 301, 306 (1977) (state court distinguishing present case from *Button*).

[119] 436 U.S. at 427.

[120] *Id.* at 427-28. The Court emphasized that the ACLU was not as interested in resolving private claims as it was in speaking out on controversial issues and seeking to further its goals of civil liberties. *Id.*

[121] *Id.* at 428-31. The Court even cited Internal Revenue Service requirements for non-profit, public interest legal associations. *Id.* at 431 n.25.

[122] *Id.* at 428-31. The Court outlined a clear difference between an arrangement whereby the attorney would share in the recovery or be paid by the plaintiff, and one in which the attorney would be compensated only at the discretion of the Court. *Id.* at 429-30. Also, the Court pointed out that, even if such discretionary compensation were allowed, the attorney would not have received any, and the funds would have gone to the ACLU's central fund. *Id.* at 430.

[123] *Id.* at 431. The Court ruled that the attorney's letter "comes within the generous zone of First Amendment protection" and that "South Carolina's action . . . must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights . . . .'" *Id.* at 431-32 (quoting Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).

[124] The cases, discussed earlier, are *Railroad Trainmen, Illinois State Bar,* and *United Transportation.* See notes 91 through 106 *supra.*

[125] 436 U.S. at 426.

[126] *Id.* (quoting United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971)).

went on to state the familiar rule that restrictions in areas of fundamental rights must be drawn with "narrow specificity."[127] Having thus set the standard, the Court determined that the disciplinary rules in question were too broad[128] and thus failed the test.[129] In reaching its decision, the Court found that although the rules had justifiable ends, their application in *Primus*—a case in which the record reflected no actual commission of the wrong intended to be prevented—was a violation of first amendment rights.[130]

Despite its disposition of the case, the Court declined to delineate further the extent to which it would allow group-sponsored solicitation to escape regulation.[131] However, the Court did intimate that the states should remain free to regulate group-sponsored solicitation that actually resulted in the evils traditionally associated with group solicitation.[132]

C. Ohralik *and In-Person Solicitation Today*

Ohralik v. Ohio State Bar Association,[133] which was decided concurrently with *Primus,* involved the more commonly recognized in-person solicitation method.[134] That the solicitation was direct and in-person is an important distinguishing feature of *Ohralik* since it gave the Court the opportunity to re-examine this more blatant practice in light of the first amendment protective standards developed simultaneously in *Primus.*[135]

In *Ohralik* the attorney learned of an auto accident and visited the parents of the injured driver to inquire about details of the incident. He then visited the injured daughter in the hospital in an attempt to obtain her signature on a contract for representa-

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[127] 436 U.S. at 433 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[128] 436 U.S. at 433.

[129] *Id.* The Court reiterated the traditional constitutional harms of overbreadth, and pointed out the potential for selective enforcement. *Id.*

[130] *Id.* at 433-37. The evils sought to be prevented—undue influence, overreaching, misrepresentation, and invasion of privacy—were not found in the record. *Id.* at 434-35.

[131] *Id.* at 438 n.33.

[132] *Id.* at 439.

[133] 436 U.S. 447 (1978).

[134] *Id.* at 449. See note 3 and accompanying text *supra.*

[135] *Ohralik* is also important since the Court had not previously addressed in-person solicitation and the first amendment protection issue.

tion in a lawsuit, which she later agreed to pursue.[136] The attorney also obtained the name of another injured passenger and visited her home where she assented to his representing her in a second lawsuit.[137] Subsequently both injured parties retracted their permission to sue; the attorney reacted by filing suit for fees based on a breach of contract.[138] The parties then filed complaints with the bar grievance committee and the attorney was eventually given an indefinite suspension by the Supreme Court of Ohio.[139]

On appeal, the attorney contended that his solicitation activities were equivalent to the advertising practices given first amendment protection in *Bates v. State Bar.*[140] The Supreme Court, however, agreed with the judgment of the Supreme Court of Ohio.[141] Distinguishing *Ohralik* from *Bates,* the Court stated that "in-person solicitation of professional employment by a law-

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[136] 436 U.S. at 450. The attorney talked with the parents on two occasions, advising them of recovery benefits on the second visit while concealing a tape recorder under his coat. They informed the attorney that their daughter had agreed to proceed with the suit and he revisited her in the hospital to obtain her signature on a contract providing him with one-third of the amount recovered. *Id.*

[137] *Id.* at 451. The attorney advised the passenger that he was representing the driver and that under an uninsured motorist clause she might recover up to $12,500. The passenger was eighteen years old, not a high school graduate, and stated she did not understand the situation clearly. The attorney, using a concealed recorder again, stated that he desired to represent her for a one-third contingency fee and she replied "O.K." The passenger was also told by the attorney that his representation would not cost her anything under the contingency arrangement. *Id.* at 451 n.4.

[138] *Id.* at 452. The insurance company offered to pay for the passenger's injuries if no claim was filed but refused to do so while the attorney persisted in his efforts to represent her. He offered to drop the claim for $2,466.66, a "conservative" estimate by his calculation of one-third of her claim. *Id.* at 452 n.5. The driver paid the attorney one-third of her recovery from a settlement with the insurance company to satisfy his claim against her for breach of contract. *Id.* at 452.

[139] *Id.* at 453-54. The Board of Commissioners found the attorney guilty of violating Disciplinary Rules 2-103(A) and 2-104(A) concerning recommendation of services to one who has not sought counsel and acceptance of employment arising from unsolicited advice. *Id.* at 453 n.9. The Supreme Court of Ohio increased the sanction given by the Board from a public reprimand to an indefinite suspension. *Id.* at 453-54.

[140] 433 U.S. 350 (1977). While this Comment does not address specifically the related areas of attorney advertising and the impact of the *Bates* decision, *Bates* does play a major role in influencing first amendment rights associated closely with solicitation situations. *Bates,* therefore, has been often included in discussions about the *Ohralik* and *Primus* decisions. *See* Welch, *supra* note 2, at 599 (commenting that under *Bates* state regulations of speech must be narrowly drawn and no broad prohibition of solicitation will be acceptable today). *See generally* Note, 1978 WIS. L. REV. 297 (reviewing *Bates* in detail and surmising its effects).

[141] 436 U.S. at 455.

yer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment."[142] The Court reiterated the limited protection afforded commercial speech, noting that commercial activity was an area of traditional governmental regulation.[143] Restrictions on in-person solicitation, the Court held, are subject to a low level of judicial scrutiny.[144]

The Court also distinguished *Bates* by finding in *Ohralik* substantive evils of solicitation, the prevention of which constitutes a compelling state interest.[145] In addition, the Court recognized a strong state interest in the maintenance of "true professionalism" in the practice of law.[146] Despite Ohralik's assertion that substantive harms were not present, the Court held that Ohralik's conduct justified the action taken by the state supreme court.[147] The Court thus firmly established that a state bar could

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[142] *Id.*

[143] *Id.* at 455-56. The Court indicated it would still follow a "commonsense" approach when comparing commercial speech, which traditionally has been regulated, with other types of speech that clearly fall within first amendment protection. *Id.* For discussions of commercial speech in the context of first amendment protection, see Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Valentine v. Chrestensen, 316 U.S. 52 (1942).

[144] 436 U.S. at 457. The Court noted that in-person solicitation constituted rather a business transaction than pure speech. *Id.*

[145] *Id.* The Court admitted that solicitation provided information on availability and terms of legal services that served the same function as the advertisement permitted in *Bates*. But other factors were listed that made the activity in *Ohralik* dangerous to the public: (1) the exertion of pressure to make an immediate commitment to the attorney, (2) the tendency of people subjected to such pressure to make uninformed decisions, (3) the lack of an opportunity for intervention by the bar, and (4) the disincentive to compare prices and quality of legal services. However, the Court emphasized that nothing was wrong with the attorney merely giving unsolicited legal advice. Instead, it condemned the acceptance of employment for pecuniary gain, using the information as "bait" for services. *Id.* at 458.

[146] *Id.* at 460-61. The Court stated that in *Bates* the advertising of routine legal services was upheld because it had no adverse effect on the professionalism of attorneys. The *Bates* Court had found "the postulated connection between advertising and the erosion of *true professionalism* to be severely strained." *Id.* (quoting Bates v. State Bar, 433 U.S. 350, 368 (1977)). But the Court stated that protection of the public from such substantive dangers of solicitation as the stirring up of litigation, fraudulent claims, overreaching, overcharging and misrepresentation was a legitimate state interest. *Id.* at 462.

[147] *Id.* at 468. The Court noted that actual harm to clients was not the proper standard for regulation but rather general misconduct that could produce such harm. The Court

constitutionally "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[148]

The Court was unanimous in *Ohralik*, and only two Justices filed concurring opinions.[149] In particular, Justice Marshall's concurring remarks shed some light on the possible limits of *Ohralik*. Noting that *Ohralik* involved two "classic examples of 'ambulance chasing,' fraught with obvious potential for misrepresentation and overreaching,"[150] Marshall observed that the tactics employed, rather than the solicitation itself, were the objectionable elements in the case.[151] Marshall would therefore limit application of the decision to methods of solicitation that present substantial dangers to individuals and society.[152] Justice Marshall further noted that many factual situations lying somewhere between that present in *Primus* and that found in *Ohralik* would be assessed in light of *Bates* as well as the two former cases.[153] He mentioned as an example of such an unaddressed area the "benign" solicitation of clients.[154] Despite his support of *Ohralik*, Marshall did consider disturbing the Court's language suggesting that commercial speech was entitled to less protection under the first amendment than the advertising allowed in *Bates*.[155] He thought such speech deserved equal protection but acknowledged that abuses could legitimize state action.[156]

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further commented, "The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." *Id.*

[148] *Id.* at 449.

[149] *Id.* at 468 (Marshall, J., concurring) and at 477 (Rehnquist, J., concurring) (using his dissent in *Primus* for his concurrence in *Ohralik*).

[150] *Id.* at 469.

[151] *Id.* at 470.

[152] *Id.*

[153] *Id.* at 472.

[154] Marshall defined "benign" solicitation as "solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous." *Id.* at 472 n.3. *Cf.* Louisville Bar Ass'n v. Hubbard, 282 Ky. 734, 139 S.W.2d 773, 775 (1940) (attorney may solicit personally when not taking advantage of clients). *See also* Petition of Hubbard, 267 S.W.2d 743, 744 (Ky. 1954) (attorney may not solicit with impunity if, in doing so, he intends to stir up trouble).

[155] 436 U.S. at 474 n.5.

[156] *Id.* at 477.

Through *Ohralik* the Supreme Court provided some uniform guidance concerning discipline for in-person solicitation by attorneys. However, the decision may very well have given rise to more questions than it answered. As pointed out by Justice Marshall in his concurrence, *Ohralik* may be interpreted in a very limited sense.[157] Indeed, the majority opinion itself intimates as much.[158] Left unanswered by the Court is whether or not the presence of specific factors such as "benign" solicitation,[159] good faith,[160] and pecuniary gain[161] will alter the result in a similar factual setting. Future cases apparently will turn on both the attorney's intent and the extent of his involvement in the solicitation process. If an attorney merely notifies the public of his services in the manner prescribed in *Bates,* then his activity should not fall within the realm of misconduct outlined in *Ohralik.* However, the propriety of personal solicitation combined with any form of pecuniary gain or other substantive evil associated with solicitation will be governed by *Ohralik.*[162] The same holds true for agents or runners employed in place of the attorney himself.[163] The Court in *Ohralik* was convinced that the public's vulnerability to unscrupulous attorneys who are apt to use improper methods of solicitation justified the low level of scrutiny applied to state regulation of in-person solicitation.[164]

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[157] See notes 150 through 156 and accompanying text *supra.*

[158] See note 143 and accompanying text *supra.*

[159] See note 154 and accompanying text *supra.*

[160] Ohralik had openly harassed the clients involved and had deviously taped conversations without notice to anyone. 436 U.S. at 469. When questioned about his activities, Ohralik stated that his taped interviews contained everything said between him and the injured passenger. *Id.* at 451 n.3. The passenger client stated that he had made introductory remarks regarding legal representation prior to the taped conversation. *Id.* Such conduct borders on bad faith by the attorney and may have affected the Court's decision. *See id.* at 469-70 (Marshall, J., concurring) (noting that Ohralik had disregarded the clients' privacy, had violated fiduciary obligations to disclose information affecting them, and had acted in potential conflict with each of the client's interest by representing both).

[161] The Court emphasized that pecuniary gain was a major factor justifying the high state interest. See *id.* at 461 n.19 (discussing subordinating the best interests of the client to an attorney's own pecuniary gain).

[162] *Id.* at 461-62 (the need to protect the public from potential harms is a legitimate state interest).

[163] *See id.* at 464 n.22 (solicitation by agents and runners would present same problems as found in *Ohralik*).

[164] *Id.* at 466.

D. *Trends Since* Primus *and* Ohralik

While *In re Primus* left the Court sufficient latitude to permit group-sponsored solicitation,[165] *Ohralik* gave the Court a tool to limit solicitation whenever it endangers clients and the reputation of the legal profession.[166] Both precedents enable the Court to be flexible in dealing with new controversies, as adequate authority will exist for either limiting or permitting solicitation by attorneys.

Undoubtedly, state courts and disciplinary committees will use the *Ohralik* decision to exert control over solicitation cases involving individual attorneys. At least one state court decision handed down since *Primus* and *Ohralik* evidences a movement in this direction. In *Pace v. State*[167] an attorney violated a Florida statute by soliciting a routine retainer agreement from a high school student.[168] The attorney challenged the statute as contrary to first amendment guarantees of free expression. In affirming the county court's finding of guilt, the Supreme Court of Florida reviewed *Button* and *Primus,* correctly distinguishing them from *Ohralik,* which the court found to be controlling.[169] In so holding, the Florida court relied on *Ohralik* to justify state regulation of in-person solicitation in an almost summary manner.[170] Therefore, *Ohralik* may very well become an effective weapon in the states' fight to control any type of solicitation that falls outside the protected group-sponsored method of *Primus*.

If attorneys fear that *Ohralik* may be interpreted improperly or even abused in the future, relief may be available. Some state bars, reconsidering the prohibition of solicitation in light of *Primus* and *Ohralik,* have taken measures to abolish all bans on solicitation.[171]

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[165] See notes 124 through 126 and accompanying text *supra.*

[166] See notes 145 through 148 and accompanying text *supra.*

[167] 368 So. 2d 340 (Fla. 1979).

[168] *Id.* at 341-42.

[169] *Id.* at 344-45. The court concluded that *Primus* and *Ohralik* had drawn a clear line between types of communication that could and could not be subject to discipline and criminal punishment. *Id.* at 342-45.

[170] The court did not delve deeply into the factual situation and made no mention of any substantive evils of solicitation that affected the specific outcome.

The court also failed to comment directly on the effect of *Primus* or *Ohralik* on an earlier case, State *ex rel.* Farber v. Williams, 183 So. 2d 537 (Fla. 1966) in which the Florida solicitation statute was upheld even in light of *Button. Id.* at 540.

[171] Melchior, *Why Moderate Lawyers Support Direct Solicitation,* THE NAT'L L. J.,

That such a proposal has received serious consideration is indicative of the progressive spirit now animating this area of the law. Whether this trend will gain momentum and spread to other states remains to be seen. More attorneys, however, are re-evaluating the advantages and disadvantages of solicitation and are beginning to emphasize the benefits rather than the traditional harms. This is especially true among young, solo practitioners desiring to build their practices and to increase competition in the legal market. Whether the strictures placed on solicitation should be relaxed, however, is as debatable today as in the past. It is doubtful that the benefits to both the profession and the public outweigh the harms manifested in *Ohralik*. In light of the *Bates* decision, solicitation is no longer absolutely necessary to provide notice of legal rights to the public. The relaxation of restrictions on advertising can and will satisfy this public need.

IV. Degree of Discipline

The controversy surrounding solicitation bans might not be so shrill if the penalties imposed for violations were not so high. Since various forms of solicitation are directly banned by state ethical canons and statutes,[172] violators are often dealt with harshly. The various sanctions range from permanent disbarment from legal practice to suspensions, censures, and reprimands. While the sanctions vary widely from state to state[173] and even within some states,[174] the severity of the punishment usually de-

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Oct. 2, 1978, at 21 (discussing California's recent tentative endorsement of abrogating all bans on solicitation).

[172] *See* Note, *supra* note 6, at 683 (author stating that the power to disbar comes from two sources: (1) an inherent power of the court to discipline its officers and (2) statutory law). *See generally* Annot., 53 A.L.R. 279 (1928).

[173] *Compare In re* Krasner, 32 Ill. 2d 121, 204 N.E.2d 10, 15 (1965) (one year suspension for payment to runner referring 70 or more cases over two and one-half years) *with In re* Black, 228 Or. 9, 363 P.2d 206, 207 (1961) (disbarment for retaining runners and paying them in 22 separate instances).

[174] *Compare In re* Krasner, 32 Ill. 2d 121, 204 N.E.2d 10, 15 (1965) (see note 168 and accompanying text *supra) with In re* Nesselson, 35 Ill. 2d 454, 220 N.E.2d 409, 411-12 (1966) (three year suspension for mailing letters soliciting personal injury cases to clients whose names were given to attorney by paid informants) *and In re* Cohn, 10 Ill. 2d 186, 139 N.E.2d 301, 303 (1957) (five year suspension for thirteen instances of admitted solicitation over three years reduced to a mere censure on the basis of attorney's good reputation and satisfied clients). *See also* Comment, *supra* note 30, at 313 (suggesting that *Cohn* is a dangerous decision in that it may encourage attorneys to risk censure for the possible profit involved in solicitation).

pends upon the intent and particular conduct of the attorney. No consistent pattern of application, however, is ever guaranteed.

Any number of factors are considered in determining the appropriate penalty for a solicitation violation.[175] Generally, however, violations of a severe, willful, and deceptive nature must be proven to justify disbarment.[176] Disbarment has been a common punishment for attorneys who solicit systematically[177] or who conceal their practices from the reviewing court.[178] It is generally thought, therefore, that some type of misconduct other than the act of solicitation must be present to warrant the severity of disbarment.[179]

The more common disciplinary action has been suspension from practice either for a specific period of time[180] or until an attorney proves himself worthy of practicing again.[181] The exact

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[175] *See* Note, *supra* note 6, at 692-93. The author lists a number of factors that may affect the degree of discipline and cases that address them: (1) the number of violations (*In re* Maltby, 68 Ariz. 153, 202 P.2d 902 (1949)), (2) the duration of the conduct (Chreste v. Commonwealth, 171 Ky. 77, 186 S.W. 919 (1916), *aff'd* 178 Ky. 311, 198 S.W. 929 (1917)), (3) the age of the attorney and his experience (Schoolfoeld v. Bean, 26 Tenn. App. 30, 167 S.W.2d 359 (1942)), (4) the attitude of the attorney (*In re* Wittekind, 26 A.D. 1001, 48 N.Y.S.2d 377 (1944)), (5) the attorney's past reputation (Waterman v. State Bar, 14 Cal. 2d 224, 93 P.2d 95 (1939)), and (6) an attorney's fair dealing with his clients (Recht v. State Bar, 218 Cal. 352, 23 P.2d 273 (1933)).

[176] *E.g., In re* Randolph, 347 S.W.2d 91 (Mo. 1961) (disbarment for using a fee-splitting scheme with investigators who suggested to personal injury victims that they contact the attorney), *cert. denied,* 368 U.S. 916 (1962). *But see* Utz v. State Bar, 21 Cal. 2d 100, 130 P.2d 377, 378 (1942) (disbarment reduced to two year suspension in a fee-splitting situation).

[177] *E.g.,* People *ex rel.* Chicago Bar Ass'n v. Bereznink, 292 Ill. 305, 127 N.E. 36, 36-37 (1920) (systematic solicitation); State v. Dowd, 158 Tex. 348, 312 S.W.2d 217, 218 (1958) (attorney had established system of soliciting workmen's compensation cases personally and through runners).

[178] *E.g., In re* Fenn, 235 Mo. App. 24, 128 S.W.2d 657, 670 (1939) (attorney seeking to secure false testimony to rebut charges); *In re* Landsman, 250 A.D. 414, 294 N.Y.S. 180, 182 (1937) (attorney having dishonest attitude before the court). *See generally* Note, *supra* note 6, at 693 (noting disbarment usually follows if concealment occurs).

[179] Note, *supra* note 6, at 693.

[180] *E.g., In re* Bossov, 60 Ill. 2d 439, 328 N.E.2d 309, 310-11 (three year suspension for soliciting through an agent), *cert. denied,* 423 U.S. 928 (1975); *In re* McBride, 164 Ohio St. 419, 132 N.E.2d 113, 117-18 (one year suspension imposed for soliciting personal injury claims despite lack of guidance by a statute on discipline), *cert. denied,* 351 U.S. 965 (1956).

[181] *E.g.,* State *ex rel.* Florida Bar v. Dawson, 111 So. 2d 427, 432 (Fla. 1959) (suspension for eighteen months and indefinitely thereafter until attorney proves himself worthy of reinstatement); *In re* Jones, 431 S.W.2d 809, 819 (Mo. 1966) (indefinite suspension from practice with a reinstatement allowed after one year upon attorney's showing himself to

period of suspension varies widely and depends on the seriousness of the offense and the attitude of the attorney.[182] In cases not warranting a suspension, courts have found censures[183] to be appropriate. Lighter disciplinary action has taken the form of public or private reprimand.[184]

While strict discipline is necessary to deter harmful solicitation practices, disbarment does appear to be an overly severe penalty for failure to comply literally with ethical canons and standards, unless the activities pursued by the attorney are so willful and malicious in nature and so damaging to the profession and the public that his services are better dispensed with permanently. For such a sanction, numerous violations, bad faith, or prior misconduct with past warnings are relevant factors to be considered. With a first offense or with a violation that borders on lack of knowledge by the attorney, however, a suspension or censure seems more appropriate. By imposing indefinite suspension subject to reinstatement, the courts will be able to assess the progress of an attorney's rehabilitation. In those cases where an attorney unknowingly violates a canon or statute but still serves the public in a conscientious manner and brings little harm upon the profession, a simple reprimand should suffice.

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be fit to practice law); Dayton Bar Ass'n v. Herzog, 173 Ohio St. 313, 181 N.E.2d 880, 881 (1962) (indefinite suspension for soliciting through the mail with forms authorizing legal work in workmen's compensation cases).

[182] *See, e.g.*, Geffen v. State Bar, 14 Cal. 3d 843, 537 P.2d 1225 (1975) (six month suspension for solicitation by an employee despite denial of knowledge of activity by attorney); Linnick v. State Bar, 62 Cal. 2d 17, 396 P.2d 33 (1964) (three month suspension for loaning money for referrals reduced from a two year suspension since attorney had no prior disciplinary action); Florida Bar v. Curry, 211 So. 2d 169 (Fla. 1968) (six month suspension for soliciting by mail and combining legal services with tax return services); *In re* Perrello, 260 Ind. 254, 295 N.E.2d 357, 360-62 (two year suspension for soliciting clients in courthouse hallways), *cert. denied*, 414 U.S. 878 (1973); *In re* Berlant, 458 Pa. 439, 328 A.2d 471, 478 (1974) (five year suspension for using runners), *cert. denied*, 421 U.S. 964 (1975).

[183] *E.g.*, *In re* Damisch, 38 Ill. 2d 186, 230 N.E.2d 254, 261 (1967); *In re* Cohn, 10 Ill. 2d 186, 139 N.E.2d 301, 303 (1957); *In re* Moore, 8 Ill. 2d 373, 134 N.E.2d 324 (1956).

[184] *E.g.*, Louisiana State Bar Ass'n v. Rutledge, 270 So. 2d 535, 539-40 (La. 1972) (reprimand given since disbarment or suspension were too harsh under the circumstances); *In re* Lee, 242 Or. 302, 409 P.2d 337, 339 (1965) (one year suspension changed to a public reprimand); *In re* Bloom, 265 S.C. 86, 217 S.E.2d 143, 146 (1975) (public reprimand).

Conclusion

Attorney solicitation is a burgeoning area of controversy and litigation. While the Supreme Court decision in *Bates* was limited in scope to legal advertising,[185] it proved to be the main impetus behind a re-examination of bar restrictions on solicitation activity which threatens greater harm to the legal profession than does advertising. The recent Supreme Court decisions in *Primus* and *Ohralik* have apparently fanned the fires of controversy between proponents and opponents of attorney solicitation.[186] These decisions have established some guidelines for future regulation of solicitation, but have left unaddressed many areas of legal activity. This gray area between blatant in-person solicitation and that protected by political expression is a discomfiting spector to an attorney faced with the opportunity to serve the public without ulterior motives. That such an opportunity may be forsaken because of confusion as to where the line is drawn between permissible and impermissible methods of solicitation is the price the public pays for uncertainty. Yet attorneys who abuse solicitation must not be permitted to go unpunished. Generally, justice will be served by enforcing the bar disciplines outlined in state canons with a cautious view toward preserving first amendment protections.

Harry E. Neblett, Jr.

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[185] See note 1 and accompanying text *supra*.

[186] See text accompanying notes 108 through 156 *supra*.

UNIONIZATION OF THE LEGAL PROFESSION

Although once considered the tool of the laborer and blue collar worker,[1] unionization has recently become attractive to the white collar worker as well. As of 1974, there were over twenty million union members across the United States;[2] among them were traditional white collar workers and professionals such as doctors,[3] nurses,[4] teachers and professors,[5] and engineers.[6] Because of the increase in the size and complexity of businesses and the resulting depersonalization of the employer-employee relationship, office workers and professionals are more and more frequently joining unions to gain more input into the formulation

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[1] Chamot, *Professional Employees Turn to Unions*, 54 HARV. BUS. REV., May-June 1976, 119 at 120; *Doctors, Nurses, and Teachers—Why More are Joining Unions*, U.S. NEWS & WORLD REPORT, Nov. 10, 1975, 61, 61 [hereinafter cited as *Doctors, Nurses*].

[2] Kistler, *Trends in Labor Growth*, 28 LAB. L.J. 539, 539 (1977).

[3] It has been estimated that between 10,000 and 40,000 doctors belong to labor organizations. Kistler, *supra* note 2, at 542. *See also Doctors, Nurses, supra* note 1, at 61-62 (the Physicians National Housestaff Association has 10,000 members, the Service Employees International Union has 1,200 doctor members, and the American Federation of Physicians and Dentists has 27,000 members). Doctors have also been known to strike. In March of 1975, some 2,000 New York doctors went on strike for four days to protest pay, hours, and working conditions. Chamot, *supra* note 1, at 119.

[4] The American Nurses Association's first labor contract with a hospital was in 1947. *Doctors, Nurses, supra* note 1, at 61. Of the 201,000 members of the American Nurses Association, 80,000 were covered by collective bargaining contracts in 1975. *Id.* at 62.

[5] In mid-1975, one teachers union, the American Federation of Teachers, had 450,000 members. Chamot, *supra* note 1, at 120. Professors are also joining unions. About twenty percent of all American professors belong to unions. *Id.* Although not the most strike-prone group, educators are nonetheless still willing to walk out over labor disputes. From 1966 through 1976 there were 53 faculty union strikes causing the loss of 183,450 faculty-days. Aussieker, *The Incidence and Impact of Faculty Union Strikes*, 28 LAB. L.J. 777, 777 (1977).

Another, albeit, unrelated group that has recently begun to unionize is comprised of prostitutes. In 1972, in San Francisco, California, a union for streetwalkers entitled Coyote (Call Off Your Old Tired Ethics) was formed. It currently has some 8,000 members and the benefits it provides include child care, legal aid for its members, and lobbying for the decriminalization of prostitution. Since Coyote was formed, similar unions have sprung up in New York, Seattle, Hawaii and Boston. Lindsey, *Streetwalkers Organize in Boston*, MS., September 1976, 20, 20. Whether they could be considered "professional" employees by virtue of their practice of the "world's oldest profession" or whether they should be viewed as blue collar workers because of a lack of prolonged specialized training in an institute of higher learning is still unresolved. For a discussion of the requirements for "professional" status under the labor laws, see note 13 and accompanying text *infra*.

[6] *See* The Austin Company, 70 N.L.R.B. 851, 857 (1946) (bargaining unit of engineers).

of their pay, benefits and working conditions.[7]

Following the recent trend of unionization of white collar workers,[8] some attorneys,[9] but many more secretaries, stenographers and paralegals employed by law firms[10] have joined unions. It now appears that, following the lead of the United States Supreme Court in *Goldfarb v. Virginia State Bar*[11] and *Bates v.*

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[7] As early as 1962, one commentator noted:

> I am convinced that sooner or later, organizations—unions in one form or another—will emerge among [professionals] as well as in the more routine groups of white collar workers. When, for example, as is already the case, some firms come to employ batteries of 2,000 or more engineers and technicians, the old notion of professional individuality is bound to give way to the needs for group representation.

Kassalow, *New Union Frontier: White Collar Workers,* 40 HARV. BUS. REV., Jan.-Feb. 1962, 41 at 51.

This analysis, which was then true of white collar workers in general, has since become true of the attorneys employed by large corporations and large law firms as well. For example, Exxon employs 400 attorneys on its in-house legal staff; Dow Chemical's legal branch has increased from 15 to 100 attorneys in the last 15 years; the General Motors Corporation legal staff has increased from 80 to 135 in recent years; Bank of America's from 70 to 130, and J.C. Penney Company's from 25 to over 100. In fact, more than half the companies that exceed two billion dollars in sales have legal staffs of more than 26 attorneys. Law firms have also grown in size. The Chicago-based law firm of Baker & McKenzie, for example, has 434 lawyers. Galluccio, *The Rise of the Company Lawyer,* FORBES, Sept. 18, 1978, 168, 168-81.

No longer is it true that such attorneys or other professionals automatically possess a strong individual bargaining position merely by virtue of their professional status. Jack Golodner, executive secretary of the Council of AFL-CIO Unions for Professional Employees, has observed:

> Before World War II, he [the professional] was a pretty elite cat . . . . Because of that, he could negotiate for himself, and didn't need collective support. But the growth of larger bureaucratic structures in industry and government has lessened the role of the professional and his control over his job and conditions of employment.

Doctors, Nurses, supra note 1, at 61.

[8] It is estimated that the white collar worker makes up half of our total work force. *See* Chamot, *supra* note 1, at 120; Kassalow, *supra* note 7, at 41. Of this group, some three million are members of unions and employee associations. Chamot, *supra* note 1, at 119 (citing U.S. BUREAU OF LABOR STATISTICS, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS 1973 (1974)). White collar workers have been among the most successful groups in unionization attempts in recent years, winning 57 percent of their organizational elections in 1974-75. Kistler, *supra* note 2, at 542. They currently comprise 24.3 percent of total union membership. *Id.*

[9] See notes 13 through 52 and accompanying text *infra.*

[10] See notes 79 through 168 and accompanying text *infra.*

[11] 421 U.S. 773, 792 (1975) (holding the legal profession subject to federal antitrust laws).

State Bar[12] in treating the practice of law as an ordinary trade or business, the time of unionized law firms has arrived.

I. Attorneys as Employees

"Professional employees" are specifically included in the coverage of the National Labor Relations Act as amended by the Labor Management Relations (Taft-Hartley) Act. They are defined in section 2(12) of the Act.[13] Examination of the legislative history makes it clear that Congress intended to include attorneys in its definition of employees under the Act. The House Conference Report noted that the definition of professional employees covered "such persons as *legal*, engineering, scientific and medical personnel together with their junior professional assistants."[14] The designation of an employee as "professional" distinguishes him from non-professional employees in only one significant respect, however. Section 9(b)(1) of the Act prohibits the combining of professionals and non-professionals in the same bargaining unit unless the professionals so desire.[15] The Report of

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[12] 433 U.S. 350, 384 (1977) (allowing attorneys to advertise in limited circumstances).

[13] Section 2(12) reads as follows:

> The term "professional employee" means—
> (a) Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
> (b) Any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1976).

[14] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).

[15] Section 9(b)(1) states in part that "the Board shall not (1) decide that any unit is appropriate for [the purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such employees vote for inclusion in such unit . . . ." 29 U.S.C. § 159(b)(1) (1976). *See also* 93 Cong. Rec. 3952 (1947) (remarks of Senator Taft on the choice given to professionals of inclusion or a separate bargaining unit); Neighborhood Legal Services, Inc. 236 N.L.R.B. No. 154, 98 L.R.R.M. 1415 (1978) (Hartford) (allowed inclusion of attorneys

the Senate Committee on Labor and Public Welfare stressed the necessity for allowing professionals the option of having a separate unit or joining with non-professionals:

> Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community of interest in maintaining certain professional standards . . . . Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own.[16]

The touchstone for an examination into the inclusion of attorneys as employees under the Act is the 1948 decision of the National Labor Relations Board in *Lumberman's Mutual Casualty Co.*[17] In that case the Independent Insurance and Banking Employees Union filed a petition for election of a bargaining unit consisting of all investigators, adjusters and attorneys employed in the New York City office of Lumberman's Mutual Casualty Company.[18] The employer argued that attorneys should not be included in the bargaining unit[19] since they were not employees within the meaning of the Act.[20] The employer additionally as-

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with clericals and other non-professionals in bargaining unit).

[16] S. REP. No. 105, 80th Cong., 1st Sess. 11 (1947).

Guards, under the Act, are the only employees who cannot be represented by a bargaining unit that contains other employees. Section 9(b) states that the Board shall not, "decide that any unit is appropriate for [the purpose of collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against other employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . . ." 29 U.S.C. § 159(b)(3) (1976); *see* Lumberman's Mut. Cas. Co., 75 N.L.R.B. 1132, 1138 n.7 (1948) (citing the statute).

[17] 75 N.L.R.B. 1132 (1948).

[18] *Id.* at 1133. Lumberman's Mutual Casualty Company will be hereinafter referred to as "the employer."

[19] The employer also objected to inclusion of the adjusters and investigators in the unit on the ground that they were management personnel. Concluding that the investigators and adjusters exercised only limited discretion in their duties, the Board included them in the bargaining unit. *Id.* at 1139-40. See note 31 and accompanying text *infra*.

[20] 75 N.L.R.B. at 1134. The employer argued that they should be excluded since they were professional employees and since they represented management. See notes 13 through 16 and accompanying text *supra* and note 31 and accompanying text *infra*.

serted that as "officers of the court" and holders of a "public trust" attorneys could not take an oath in support of the union which would in any manner limit their duties as attorneys and fiduciaries.[21] There were ten or eleven attorneys in the employer's legal division who were supervised by an attorney of record.[22] The supervisor assigned cases to the attorneys under him and could direct and discipline them.[23] Although the attorneys exercised their own discretion in handling cases, they were subject to general employment guidelines set forth by the employer.[24] The attorneys were hired and fired just like other employees and were subject to the same policies and working conditions.[25]

In its opinion the Board first addressed the contention that the attorneys should not be included in the bargaining unit because they were professionals. Citing section 2(12) of the Act,[26] the Board ruled that professional status was not a bar to enjoyment of the benefits of the Act.[27] The Board then examined three exceptions to employee status. Noting that the attorneys involved[28] clearly were not supervisory personnel[29] since no employ-

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[21] 75 N.L.R.B. at 1134. The employer also argued that the membership of an attorney in a union would violate the Canons of Ethics of the American Bar Association. *Id.* See notes 53 through 78 and accompanying text *infra.*

[22] 75 N.L.R.B. at 1134.

[23] *Id.*

[24] *Id.* For example, company policy prescribed the type of cases for which jury trial was not to be requested, and certain affirmative defenses, such as contributory negligence, were required by company policy to be asserted in given cases. In addition, the attorneys were not allowed to settle any case without the express permission of the employer. *Id.* at 1134-35.

[25] The attorneys were subject to withholding tax, unemployment insurance and social security taxes just as other employees. They worked regular hours, 8:55 a.m. to 5:00 p.m., they were required to carry identification cards and they received vacations based on their length of service with the employer. *Id.* at 1135.

[26] 29 U.S.C. § 152(2) (1976). See note 13 and accompanying text *supra.*

[27] 75 N.L.R.B. at 1135.

[28] Only staff attorneys were involved; the supervising attorney was not included in the requested bargaining unit. *Id.* at 1133.

[29] The supervisory exclusion is a statutory mandate. Section 2(3) of the Act states "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1976). The term "supervisor" is defined in section 2(11) of the Act:

> The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely rou-

tine or clerical nature, but requires the use of independent judgment.
29 U.S.C. § 152(11) (1976).

This section of the Act was passed in response to the Supreme Court's ruling in Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), in which the Court held that foremen were entitled to be included in bargaining units. *Id.* at 490-91; *see* NLRB v. Bell Aerospace Co., 416 U.S. 267, 279 (1974) ("[T]he *Packard* decision was a major factor in bringing about the Taft-Hartley Act of 1947 . . . ."). That Congress did not intend for foremen to fall within the meaning of the term "employee" for purposes of coverage under the Act is evidenced by the report of the Senate Committee on Labor and Public Welfare: "[N]othing in the record developed before this committee [justifies] the conclusion that there is such a thing as a really independent foremen's organization." S. REP. No. 105, *supra* note 16, at 4. In addition, section 164(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be *compelled* to deem individuals defined herein as supervisors as employees for the purpose of . . . collective bargaining." 29 U.S.C. § 164(a) (1976) (emphasis added). While supervisors are not employees under the Act and employers are not compelled to bargain with them, the employer may voluntarily bargain with them if he desires. *See, e.g.*, Retail Clerks, Local 330 v. Lake Hills Drug Co., 40 Lab. Cases (CCH) ¶ 18,916 (W.D. Wash. March 11, 1964) (upholding NLRB jurisdiction over dispute involving a bargaining unit encompassing both supervisory and nonsupervisory employees since employer had voluntarily recognized that supervisors are members of the unit); *cf.* NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 576 (6th Cir. 1948) (holding that while an employer could not be compelled to bargain with supervisory employees, he could voluntarily do so). The Sixth Circuit had previously relied on the Supreme Court decision in *Packard Motor Car* in holding that the foremen of the Edward G. Budd Company were employees under the Act. NLRB v. Edward G. Budd Mfg. Co., 162 F.2d 461 (6th Cir. 1947) (per curiam). Soon thereafter, Congress passed the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-87 (1976)), which excluded supervisors from the definition of "employee." Upon the filing of a petition for certiorari, the Supreme Court remanded the case to the Sixth Circuit, which finally determined that the foremen were supervisors under the new amendment. 169 F.2d at 575.

While it is clear that professionals are included in the coverage of the Act and supervisors are excluded, it is not always easy to tell whether a professional with some elements of supervisory status should be included or excluded. Professionals are by definition employees whose work involves the consistent exercise of discretion and judgment in its performance. *Cf.* Mourning v. NLRB, 559 F.2d 768, 771 (D.C. Cir. 1977) (remand of administrative law judge's determination that an airline pilot was a supervisor to consider whether he exercised control over other employees in an other than "sporadic and routine" manner). It has been held that possession of only one of the several types of authority listed in the Act is sufficient to confer supervisory status on an employee. *See* NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 576 (6th Cir. 1948)(rejecting the contention that employees must possess all the traits listed in the Act to be supervisors, and holding that Congress intended the list to be construed so that possession of any of the traits conferred supervisory status). More recently it has been held that the mere presence of more forms of authority without the more decisive power to hire and fire does not confer supervisory status. *See, e.g.*, Howard A. Friedman & Assocs., 192 N.L.R.B. 919, 919 (1971) (architectural associates who could make limited recommendations concerning other employees but who lacked the authority to hire and fire were not supervisors under the Act); The Singer Co., 170 N.L.R.B. 1393, 1394 (1968) (production worker who also had the authority to instruct new employees and to oversee completion of overtime work but who had no power to hire and fire was not a supervisor).

ees worked under them other than stenographic and clerical personnel drawn from a common pool as they became available,[30] the Board also found that the attorneys did not fall within the managerial exclusion[31] because they did not "formulate, deter-

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The attorneys in *Lumberman's Mutual* may well be typical of associates in large law firms and attorneys employed by large corporations in the extent to which they can exercise control over clerical employees. In the years since *Lumberman's Mutual,* the Board has gone only slightly further in determining what measure of control over clericals will place an attorney in a supervisory position. In Air Line Pilots Ass'n, 97 N.L.R.B. 929 (1951), the Board held that the mere fact that attorneys have personal secretaries does not make them supervisors. *Id.* at 931. *But cf.* Ramsey Motor Co., 99 N.L.R.B. 408, 410 (1952)(employee who can direct the work and has the authority to fire one subordinate is a supervisor).

[30] 75 N.L.R.B. at 1135-40.

[31] Unlike the supervisory exclusion, the exemption of managerial employees from coverage under the Act is nonstatutory and has been developed through decisions of the Board. The NLRB has decided that employees who formulate, determine and implement management policies are managerial employees who should be excluded from coverage. The rationale behind this exclusion is that as representatives of management these employees have no common interest with the rank and file. *See, e.g.,* Hoffman Bros., 188 N.L.R.B. 319, 322-23 (1971) (son of owner who was paid about twice as much as other employees doing the same work was held to have interests more aligned with management than employees and therefore excluded from the bargaining unit); Santa Fe Trail Transp. Co., 119 N.L.R.B. 1302, 1306-07 (1958) (freight agents who represent and protect the employer's interests are managerial employees and excluded from coverage); Swift & Co., 115 N.L.R.B. 752, 753-54 (1956) (holding the existence of a bargaining unit of procurement drivers inappropriate since they made purchases on the employer's behalf and therefore had interests different from other employees).

The Board attempted a retreat from this policy exclusion of managerial employees in the 1970 decision of North Ark. Elec. Coop. 185 N.L.R.B. 550 (1970). In determining whether the discharge of a managerial employee was an unfair labor practice, the Board stated that different standards should apply in unfair labor practice cases and representation cases. *Id.* The Board held that a managerial employee might be excluded from a bargaining unit because he lacked a community of interest with other employees but he was still an "employee" under the Act and entitled to protection from unfair labor practices unless he "participated in the formulation, determination, or effectuation of policy with respect to employee relations matters." *Id.* at 550-51. In 1971, the Board in Bell Aerospace Co., 190 N.L.R.B. 431 (1971) attempted to extend this new standard for inclusion to representation cases. In *Bell,* the Board reversed its earlier decisions and stated that managerial personnel were "employees" under the Act and entitled to organize "unless there is some cogent reason for denying such representation." *Id.* at 431 (footnote omitted). The Board went on to rule that potential conflicts of interest on the part of buyers who would owe loyalty to both union and employer was not a sufficient reason to deny their right to representation. *Id.* The employer moved for a rehearing and, in denying the motion, the Board stated that Congress intended to exclude only those managerial employees who dealt with the "formulation and implementation of labor relations policies." Bell Aerospace Co., 196 N.L.R.B. 827, 828 (1972). After the Court of Appeals denied enforcement of the Board's order, Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973), the Supreme Court granted certiorari. NLRB v. Bell Aerospace Co., 414 U.S.

mine, or effectuate management policies."[32] Finally, the Board ruled that they were not confidential employees[33] since they were

816 (1973). After an exhaustive analysis of the legislative history of the Taft-Hartley Act and the Board's subsequent construction of the Act, the Court held that "unmistakably . . . 'managerial employees' are not covered by the Act." NLRB v. Bell Aerospace Co., 416 U.S. 267, 289-90 (1974).

The Act, however, specifically provides for coverage of professional employees even though this group has traditionally exercised a great degree of discretion and control in the performance of duties. In AFL-CIO, 120 N.L.R.B. 969, 973 (1958), the Board stated that "[t]he performance of duties under little supervision and involving the exercise of considerable discretion does not necessarily indicate managerial status." *Accord,* Westinghouse Elec. Corp., 163 N.L.R.B. 723, 726 (1967) (holding that engineers whose work "require[d] a high degree of technical competence and the use of independent judgment with respect to matters of importance to the Employer's financial and other managerial interests" were not managerial personnel but were professionals and entitled to representation); Dayton Power and Light Co., 137 N.L.R.B. 337, 339 (1962) (data programmers were properly included in a bargaining unit even though they exercised discretion in the performance of their duties); Swift & Co., 124 N.L.R.B. 899, 900 (1959) (office clerk who assisted in decisions related to sales and acquisitions was properly included in unit). Professional employees, then, who exercise great individual discretion but who do not shape the employer's policies are not managerial employees. *See, e.g.,* Fireman's Fund Ins. Co., 173 N.L.R.B. 982, 984 (1968) (insurance adjusters and investigators); Westinghouse Elec. Corp., 138 N.L.R.B. 778, 780 (1962) (senior internal auditor); Eastern Corp., 116 N.L.R.B. 329, 332 (1956) (accountants); Transit Cas. Co., 83 N.L.R.B. 857, 859 (1949) (insurance adjusters). *See also* Continental Ins. Co. v. NLRB, 409 F.2d 727, 730 (2d Cir.) (insurance adjusters are not managerial employees), *cert. denied,* 396 U.S. 902 (1969).

[32] 75 N.L.R.B. at 1136.

[33] The exclusion of confidential employees from coverage under the Act is another Board policy not set forth in the statutes themselves. *See* The Hoover Co., 55 N.L.R.B. 1321 (1944). In *Hoover,* the board excluded clerical employees who prepared wage reports and confidential memos dealing with the employer's labor relations. *Id.* at 1322-23. The Board stated:

> We have previously expressed our awareness of the fact that in negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.

Id. at 1323 (footnote omitted). This exclusion is narrower than it may seem—only those employees who possess confidential information or exercise managerial discretion in the area of their employer's labor relations are deemed confidential employees to be excluded from bargaining units. *Compare* Arlan's Dep't Store, 131 N.L.R.B. 565, 568 (1961) (assistant office managers who did not handle labor relations matters for the employer were not confidential employees) *with* The B.F. Goodrich Co., 115 N.L.R.B. 722, 725 (1956) (secretaries for the personnel and office managers were confidential since they dealt with labor relations of the employer). It is not a sufficient basis for exclusion that the employee possesses confidential information unrelated to the employer's labor relations. *See,*

"not concerned with the Employer's labor relations policies either directly or indirectly."[34]

The Board next addressed the employer's contention that the attorneys should not be allowed to organize since they were officers of the court and fiduciaries. Finding that while all attorneys were subject to rules and guidelines enforced by the courts, the Board concluded that a normal employer-employee relationship existed because the attorneys' pay, hours and working conditions were controlled by the employer.[35] Finally, the Board responded to the employer's contention that it enjoyed an attorney-client confidentiality privilege with its attorney-employees that forbade the attorneys' organizing into a bargaining unit.[36] The Board reemphasized the fact that the attorneys were hired, fired and treated just like regular employees and noted that they were paid an annual salary rather than a fee for each case they tried. They were not private attorneys called in to handle matters from time to time, but were in fact employees and entitled to organize.[37] In reaching its holding the Board observed that

> [b]ecause the usual incidents pertaining to an employer-employee relationship here exist, because they are neither supervi-

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e.g., NLRB v. Poultryman's Serv. Corp., 138 F.2d 204, 210-11 (3rd Cir. 1943) (including three confidential office employees in a bargaining unit where they did not handle labor relations matters since "[p]ossession of confidential information is of itself insufficient to justify deprivation of the right to collective bargaining"); Arnold Constable Corp., 150 N.L.R.B. 788, 794 n.13 (1965) ("None of these employees assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."); Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) (setting forth the Board's policy that this exclusion should be narrowly construed to allow inclusion where the employee has access to labor relations data but does not act in or assist someone who acts in a managerial function with regard to the data); Westinghouse Elec. Corp., 138 N.L.R.B. 778, 780-81 (1962) (industrial relations assistants who work in labor relations but exercise limited discretion are not confidential employees). Thus, to be excluded under this exemption, the attorney must be in a position to hold key information or exercise influence in the employer's formation of his own labor policy concerning wage rates, contracts with bargaining units, arbitration, grievance data, and negotiation. *See* The Hoover Co., 55 N.L.R.B. at 1323.

[34] 75 N.L.R.B. at 1136.

[35] *Id.* at 1136-37.

[36] *Id.* at 1137.

[37] *Id.* "For all these reasons, we are of the opinion that, although a client-attorney relationship is coexistent with that of an employer-employee in this case, the client-attorney relationship does not preclude these employees from exercising their statutory right to bargain collectively with respect to conditions of employment." *Id.*

> sory, managerial nor confidential, none of these contentions made by the Employer persuades us that the attorneys are not employees, or that they should be deprived of the benefits of self-organization guaranteed them by [the Act.][38]

The Board concluded by placing the attorneys in a bargaining unit separate from that of the other non-professional employees.[39]

In *Air Line Pilots Association,*[40] the first case before the Board involving employees of a labor union,[41] the Union of Air Line Pilots Association Professional and Administrative Employees sought to organize eighteen employees of the Air Line Pilots Association Union.[42] Three of the employees in the proposed unit were attorneys.[43] Noting that the attorneys handled general legal work for and represented the employer in court and administrative proceedings,[44] the Board found that because of their consistent exercise of discretion and the non-routine nature of their work the attorneys fit within the Act's definition of professional employees.[45] Consequently, the Board determined that the attorneys were under the Act and were to be allowed the choice of joining the general bargaining unit or forming a separate unit with the other professionals.[46]

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[38] *Id.* at 1136.

[39] We shall not deprive these attorneys of their right to be represented by a labor organization for the purpose of collective bargaining, even though the labor organization admits nonprofessional employees to membership. But we believe that any problems which may arise with respect to the attorneys may best be solved by their representation in a separate unit. We shall, accordingly, place them in a unit of their own.

Id. at 1138-39.

[40] 97 N.L.R.B. 929 (1951).

[41] "The Board has never in its 16 years of experience been called upon before to decide a case involving the employees of a labor union." *Id.* at 929.

[42] Id. at 930. The employer, Air Line Pilots Association, was a labor union that represented 6,400 pilot members across the United States. The employees seeking to be represented were three attorneys, two engineers, a statistician and twelve nonprofessional employees of the Air Line Pilots Association. *Id.*

[43] *Id.* at 931.

[44] *Id.*

[45] *Id.*

[46] *Id.* The procedure for the election was detailed as follows:

> The employees in the professional voting group . . . will be asked two questions on their ballot: (1) Do you desire to be included in a unit with the nonprofessionals? (2) Do you desire to be represented for the purposes of collective

In the only other reported decision[47] dealing with the "employee" status of attorneys[48] under the Act, the Regional Director for the Brooklyn region of the National Labor Relations Board granted a petition for election filed by the Teamsters for a unit of salaried claims attorneys employed by the Royal Globe Insurance Company.[49] The Teamsters sought to organize a unit of twenty-seven claims attorneys who prepared and litigated claims for the employer in that area. All the attorneys were under the supervision of one of several attorneys in charge who in turn was directed by the employer's attorney of record.[50] The employer argued that inclusion of the attorneys in a bargaining unit violated the Canons of Professional Ethics.[51] The Regional Director rejected this argument, citing *Lumberman's Mutual Casualty Co.*[52] As a result of the decisions in *Lumberman's Mutual Casualty Co., Air Line Pilots Association* and *Royal Globe Insurance Companies,* the foundation was laid for the establishment of the principle that attorneys fall within the definition of "employees" under the National Labor Relations Act and are thereby entitled to organize.

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bargaining by the petitioning union? If a majority of the professional employees vote "Yes" to the first question, indicating their wish to be included in a unit with the nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessionals to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees vote against inclusion, they will not be included with the nonprofessional employees; their vote on the second question will then be counted to decide whether or not they want to be represented by the Petitioner in a separate [bargaining] unit.

Id. at 932-33.

[47] Royal Globe Ins. Companies, 1969 CCH NLRB Decisions, ¶ 20,695 (1969).

[48] Although not directly on point for present purposes, two other decisions dealt with the "employee" status of lawyers as professors. In Fordham University, 193 N.L.R.B. 134, 137 (1971), the Board designated as appropriate a unit composed of all law school professors except the dean and the law school librarian. In Syracuse University, 204 N.L.R.B. 641, 643 (1973), the Board again allowed law school professors to join a bargaining unit. Relying on *Fordham* and noting that there was no commonality of interest between the two groups, the Board approved a separate unit for law faculty apart from other faculty members. *Id.*

[49] 1969 CCH NLRB Decisions, ¶ 20,695, at 26,143.

[50] *Id.* at 26,145.

[51] *Id.* The employer argued that it was a violation for attorneys to be in the same union with members who were not attorneys. *See* note 39 and accompanying text *supra.*

[52] 1969 CCH NLRB Decisions, at 26,145 (citing Lumberman's Mutual Casualty Co., 75 N.L.R.B. 1132 (1948)). See notes 17 through 33 and accompanying text *supra.*

II. ABA RESPONSE

Although attorneys have the right to organize under the National Labor Relations Act, this right is subject to the appropriate regulatory powers of the national and local bar associations.[53] The American Bar Association has long struggled with the issue of the propriety of attorneys joining labor organizations and has consistently been concerned with four major problems in that area: attorney-client confidentiality, strikes by attorneys, lay control of attorneys and the possibility of salary and advancement determination on the basis of factors other than merit and competence. The American Bar Association, in its Code of Professional Responsibility,[54] has decreed that:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.[55]

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[53] The regulation of the legal profession is primarily under the control of state supreme courts, with federal courts and agencies separately regulating those that practice before them. In all but a few states, however, supreme court control of postadmission discipline operationally means little more than rulemaking and an involvement in disciplinary practice as the final adjudicatory body. The primary operating responsibility for discipline lies in state or local bar organizations.

Steele & Nimmer, *Lawyers, Clients, and Professional Regulation,* 1976 AM. BAR FOUNDATION RESEARCH J. 917, 921.

[54] ABA CODE OF PROFESSIONAL RESPONSIBILITY & CANONS OF JUDICIAL ETHICS (1969) [hereinafter cited as ABA PROFESSIONAL CODE]. The ABA PROFESSIONAL CODE became effective on January 1, 1970, replacing the former 32 CANONS OF PROFESSIONAL ETHICS.

For a good discussion of the early history of legal ethics codes, *see generally* H. DRINKER, LEGAL ETHICS (1953); L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 40-49 (1971). *See also* Patterson, *Wanted: A New Code of Professional Responsibility,* 63 A.B.A.J. 639, 640-41 (1977) (discussing a lawyer's loyalty to clients and others).

[55] ABA PROFESSIONAL CODE, Ethical Consideration 5-13 (1970). Canon 5, from which Ethical Consideration 5-13 is drawn, states "[a] lawyer should exercise independent professional judgment on behalf of a client." In the same vein, the ABA PROFESSIONAL CODE also provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients,

Although the ABA has yet to issue an interpretive opinion on this new section of the code, its rulings concerning the superseded Canons of Professional Ethics are controlling until overruled by new decisions.[56] In Formal Opinion No. 275[57] the committee responded to the inquiry of an attorney employed by an insurance company concerning the propriety of his joining a labor union composed of claims adjusters. Relying primarily on canon 35,[58] which prohibits control of an attorney by a lay intermediary, the committee ruled that the attorney's joining the union would be a violation of the canons since his allegiance to the labor union could conflict with his personal duty to his client. The committee was also concerned that membership in the union could place the attorney in a position where he would have to divulge confidential information—a violation of canon 35's mandate that an attorney preserve his client's confidences. Moreover, the committee commented that an attorney's union membership would violate canon 12's prohibition against an attorney's permitting himself to be bound by a fee schedule set by someone else, and that a strike call by the union would impinge on the attorney's duty under canon 44 to refrain from withdrawing from employment, once assumed.[59] The committee concluded:

> [T]he law is not a business but a profession. By joining it, a lawyer foregoes the advantages, of recent years so extensively exploited, of advertising and of using collective effectiveness to secure increased compensation by arbitrary measures not re-

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nor the desires of third persons should be permitted to dilute his loyalty to his client.

ABA PROFESSIONAL CODE, *supra* note 54, Ethical Consideration 5-1 (1970).

[56] The Standing Committee on Professional Ethics of the ABA has provided that:

> [O]pinions of the Committee issued prior to the effective date of the Code of Professional Responsibility shall continue in effect to the extent that they are not inconsistent with a specific provision of that Code and may be used as an appropriate guide in interpreting the Code of Professional Responsibility.

ABA PROFESSIONAL CODE, *supra* note 54, at 49.

[57] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 275, at 609 (1967) [hereinafter cited as ABA OPINIONS].

[58] ABA CANONS OF PROFESSIONAL ETHICS No. 35 (1908). Canon 35 provided in part: "the professional services of a lawyer should not be controlled or exploited by any law agency, personal or corporate, which intervenes between client and lawyer."

[59] ABA OPINIONS, No. 275, at 609 (1967).

> lated to efficient service, which, in the last analysis, is the sole legitimate basis for the lawyer's advancement.[60]

The ABA committee next addressed the issue of organization of attorneys in the context of federal employment. In Informal Opinion No. 917,[61] the committee ruled that it would be improper for an attorney employed by a federal agency to join a union that also admitted non-attorneys to membership.[62] In reaffirming Formal Opinion No. 275, the committee stressed that the attorney owed his complete allegiance to the federal agency and that in joining a union he would surrender his power to act independently and would divide his loyalties.[63] The Committee on Professional Ethics of the Federal Bar Association addressed the question of who the client of a federal governmental lawyer is as follows: "[T]he client of the federally employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed

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[60] *Id.* at 611. This notion is in keeping with Dean Pound's often quoted definition of a profession: "The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

[61] ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 917 (1966) [hereinafter cited as ABA INFORMAL OPINIONS].

[62] In 1973, the Federal Bar Association adopted a series of federal ethical considerations to provide a clearer framework for analysis of problems peculiar to governmental lawyers. *See* Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541-44 (1974).

The attorney in this case had pointed out that his presence in the union should not constitute a violation since the labor union was comprised solely of federal employees who were forbidden by law to strike. *See* 5 U.S.C. § 7311 (1976) which provides:

> An individual may not accept or hold a position in the Government of the United States . . . if he . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States . . . or (4) is a member of an organization of employees of the Government of the United States . . . that he knows asserts the right to strike against the Government of the United States. . . .

Id.

[63] If, however, he becomes a member of a labor union, then he assumes an obligation to it, which may at times become incompatible with obligation to [his employer]. He would be surrendering his independent judgment and become subject to the direction of the union and its officers. No lawyer should place himself in that position.

ABA INFORMAL OPINIONS, No. 917, at 2.

. . . ."[64] This definition of the federally employed attorney's "client" may disappoint those who believe that federal employees exist to serve the public rather than the federal government. The ABA's concern over a division of loyalty, however, is applicable whether the client is the federal government or the public at large.

In Informal Opinion No. 934,[65] the committee addressed the issue of whether an attorney who did not belong to a union could with impunity carry a sign and engage in peaceful picketing.[66] Mindful, no doubt, of basic first amendment freedoms,[67] the committee grudgingly gave its opinion that such picketing might not constitute a violation of the canons. The committee stated that "[w]hile . . . an attorney . . . has a right to engage in peaceful picketing so long as no violation of law is involved, we feel that such actions on his part invite criticism of his professional judgment and conduct."[68]

Along with the boycott and strike, the picket is one of the most effective weapons of organized labor. Although the committee has yet to rule directly on the propriety of attorneys picketing in a labor dispute context, Informal Opinion No. 934 seems to indicate that such activity would not be prohibited so long as it is peaceful and otherwise legal.

The committee first gave approval to union membership by an attorney in Informal Opinion No. 986.[69] The attorney in that case was employed by a city that was entering into a bargaining agreement with a union. The agreement was to determine all employees' rights, benefits and salaries, including those of the city's attorneys. The attorney argued that he should be allowed to join the union because his conditions of employment were controlled by whatever agreement the union made with the city. The committee allowed him to join a union consisting solely of attorneys under the following limited circumstances:

It is our opinion, therefore, that lawyers who are paid a salary

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[64] OPINION 73-1 *published in* 32 FED. B.J. 71, 72 (1973).

[65] ABA INFORMAL OPINIONS, No. 934 (1966).

[66] *Id.*

[67] *See* Amalgamated Food Emp. Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968) (peaceful picketing in public place is protected activity).

[68] ABA INFORMAL OPINIONS, No. 934, at 1-2 (1966).

[69] ABA INFORMAL OPINIONS, No. 986, at 2-3 (1967).

> and who are employed by a single client employer may join an organization limited solely to other lawyer employees of the same employer for the purpose of negotiating wages, hours and working conditions with the employer client so long as the lawyer continues to perform for his employer client professional services as directed by his employer and in accordance with the Canons of Ethics. Such a lawyer would not have the right to strike, to withhold services for any reasons, to divulge confidences or engage in any other activities as a member of such a Union which would violate any Canon.[70]

Each of the problem areas delineated earlier regarding the unionization of attorneys was considered by the committee in this opinion. Pursuant to Informal Opinion No. 986 and subject to certain rigid requirements, attorneys who are employed by a single employer and paid a salary may now join a union. Although not clearly defined in the opinion, the phrase "lawyers who are paid a salary and who are employed by a single client employer" appears to cover only attorneys employed by governmental agencies or businesses. Lawyers employed by law firms do not appear to be covered because they generally have multiple clients.[71]

This restrictive holding conflicts with the recent stance taken by the National Labor Relations Board.[72] Although the ABA's position on the rights of law firm attorneys to join unions is not clearly established and to date has received no attention from the Supreme Court, it should be noted that the Supreme Court has not hesitated to strike bar association policies it considered unconstitutionally restrictive.[73] In all likelihood, given the ambiguity of current ABA rulings and the position of the Supreme Court toward the legal profession, it is improbable that attorneys employed by law firms will be denied the right to organize. Although the committee in Informal Opinion No. 986 stated that a union must provide in its constitution or by-laws that it would adhere strictly to the Canons of Ethics, in a subsequent

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[70] *Id.*

[71] See notes 92 through 112 and accompanying text *infra.*

[72] See notes 135 & 136 and accompanying text *infra.*

[73] *See* Bates v. State Bar, 433 U.S. 350, 384 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). See notes 11 & 12 and accompanying text *supra.*

opinion[74] the committee recanted and stated that an actual writing of a strict adherence provision in the constitution was not required so long as the lawyers conformed to the standards of Informal Opinion No. 917.

Following the general trend toward opening the academic world to the presence of competitive collective bargaining,[75] the propriety of law professors joining labor unions was acknowledged by the committee in Informal Opinion No. 1060.[76] In this opinion the committee allowed a law professor who was not at the time practicing law to join a union with non-attorney professors so long as he was not called on to act in any way as an attorney representing a client.[77] Since the committee in Informal Opinion No. 986[78] had forbidden attorneys to strike or engage in any work stoppage, the spectre of law professors striking during exam week should remain just that—a spectre.

III. Law Firms as Employers

To be covered by the Act, an employee must of course work for an employer who falls within the jurisdictional purview of the Act.[79] In *NLRB v. Jones & Laughlin Steel Corp.*,[80] the Supreme

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[74] ABA Informal Opinions, No. 1029, at 1 (1968).

[75] See note 5 and accompanying text *supra*.

[76] ABA Informal Opinions, No. 1060, at 2 (1968).

[77] *Id.*

[78] See note 70 and accompanying text *supra*.

[79] NLRA jurisdiction extends to all employers whose business is either "in commerce" or whose business "affects commerce." "In commerce" is defined in section 2(6) of the Act as:

> trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any territory of the United States and any state or other territory, or between any foreign country and any state, territory, or the District of Columbia, or within the District of Columbia or any territory, or between points in the same state but through any other state or any territory or the District of Columbia or any foreign country.

29 U.S.C. § 152(6) (1976); *see, e.g.*, Washington, Virginia, and Maryland Coach Co. v. NLRB, 301 U.S. 142, 146 (1937) (asserting jurisdiction over bus company whose operations between Washington D.C. and Virginia were held to affect commerce).

The term "affecting commerce" is defined in section 2(7) of the Act as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7) (1976); *see, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-32 (1937).

[80] 301 U.S. 1 (1937).

Court construed the National Labor Relations Act to give the Board the broadest jurisdictional grant possible under the commerce clause.[81] The Court stated:

> It is the effect upon commerce, not the source of the injury, which is the criterion.
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> . . . .
>
> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[82]

Because of the magnitude of its case load,[83] however, the Board has chosen not to assert its full jurisdictional powers.[84] Prior to 1950, the Board declined to exercise jurisdiction over disputes it described as "essentially local in character."[85] In

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[81] *Id.* at 37; *see* U.S. CONST. art. 1, § 8, cl. 3. *See also* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (Congress, in passing the NLRA, "intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause").

[82] 301 U.S. at 32, 37. *See also* R. GORMAN, BASIC TEXT ON LABOR LAW § 1 (1976); 1 JENKINS, LABOR LAW § 2.21 (1974). Possibly the greatest extension to date of the grant of jurisdiction under the commerce clause was the 1942 decision in Wickard v. Filburn, 317 U.S. 111, 128-29 (1942), in which the Supreme Court held that the consumption of wheat wholly upon the farm on which it was grown affected commerce because it could affect the supply and demand of grain sold across state lines.

[83] In fiscal year 1977, the Board handed down 2,887 decisions, up from a record 2,685 decisions during 1976. 42d ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 20 (1977). In addition, the NLRB is involved in more appeals court litigation than any other federal agency, with a total of 260 NLRB-related appeals court decisions in 1977. *Id.* at 23. In fiscal year 1978, the Board handed down 2,759 decisions and courts of appeals ruled on 333 NLRB-related cases. 43d ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16-18, 20 (1978).

[84] *See* GORMAN, *supra* note 82, at § 2; JENKINS, *supra* note 82, at § 3.3.

This approach has been specifically approved by the Supreme Court. *See* NLRB v. Denver Building & Constr. Trades Council, 341 U.S. 675, 684 (1951), in which the Court stated the "[e]ven when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

[85] *See, e.g.*, Central Tower, Inc., 84 N.L.R.B. 357, 359 (1949). *See also* JENKINS, *supra* note 82, at § 3.3. The Board at this time decided on a case-by-case basis whether assertion of jurisdiction would enhance the purposes of the Act. *See, e.g.*, George W. Looby, 85 N.L.R.B. 412, 413 (1949) (declining to exercise jurisdiction over small bar); Central

1950, in *Hollow Tree Lumber Co.*,[86] the Board announced a general set of jurisdictional guidelines it would follow in determining whether to exercise its jurisdictional power.[87] The Supreme Court, however, ruled in two decisions[88] that the Board contravened the intent of Congress when it declined jurisdiction over industries or unions as a class.[89] By amending the National

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Tower, Inc., 84 N.L.R.B. 357, 359 (1949) (excluding 100-tenant general office building from coverage).

[86] 91 N.L.R.B. 635 (1950).

[87] The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce . . . . The time has come, we believe, when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.

Id. at 636.

[88] In Office Employees, Local 11 v. NLRB, 353 U.S. 313 (1957), the Board had declined to assert jurisdiction over a labor union in its capacity as an employer. Oregon Teamsters, 113 N.L.R.B. 987 (1955). The Supreme Court reversed, stating that the Board could not refuse to assert jurisdiction over a *class* of employers. 353 U.S. at 320. In the second decision, Hotel Employees, Local 255 v. Leedorn, 358 U.S. 99 (1958), the Court ruled *per curiam* that the Board had acted improperly when it refused to assert jurisdiction over hotels as a class. *Id.* at 99.

[89] In the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.). Congress added section 14(c)(1) to the NLRA, which explicitly affirmed the Board's power to decline jurisdiction at its discretion. Section 14(c)(1) reads:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jursidiction; Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

29 U.S.C. § 164(c)(1) (1976).

The standards in effect on August 1, 1959, were those detailed in Siemons Mailing Service, 122 N.L.R.B. 81 (1958), supplemented 124 N.L.R.B. 594 (1959). Those standards are as follows:

> Non-retail . . . $50,000 in goods or services flowing into or from the employer.
> Retail concerns . . . gross revenues of $500,000 annually.
> Office Buildings . . . gross revenues of $100,000, or which $25,000 or more is derived from enterprises which meet any of the current criteria.
> Instrumentalities, links, and channels of Interstate Commerce . . . $50,000 from interstate part of enterprise or for services performed for other employers in commerce.

Labor Relations Act in 1959, Congress gave the Board explicit statutory authority to exercise jurisdictional discretion,[90] even to the extent of declining jurisdiction over whole classes of employers.[91]

In 1973, the Board exercised its authorized discretion in declining to assert jurisdiction over law firms as a class.[92] In *Bodle,*

Public utilities . . . $250,000 gross revenues or standards for non-retail concerns.

Transit systems . . . $250,000 gross revenues or standards for non-retail concerns.

Newspapers and Communication systems . . . newspapers—$200,000 gross volume; radio, television, telegraph and telephone—$100,000 gross volume.

Hotels and motels . . . $500,000 gross revenue (excluding hotels and motels, 75% of whose guests remain more than one month, or which receive 75% of their income from such guests).

Hospitals, nursing homes and other health and child care centers. . . . Profits and non-profit hospitals—$250,000 gross revenues; nursing homes—$100,000 gross revenues; other health and child care facilities—$250,000 gross revenues.

See CCH 1977 GUIDEBOOK TO LABOR RELATIONS 26-28 (1977); JENKINS, *supra* note 82 at §§ 3.4-3.13.

[90] The proviso in section 14(c)(1) precluded the Board from declining jurisdiction over employers who met the 1959 guidelines. In doing so, it limited the extent to which the Board could decline jurisdiction, while leaving it to the Board to determine how much broader their coverage should be.

[91] The 1959 amendment statutorily overruled the Supreme Court's chastisement of the Board in *Hotel Employees, Local 255* and *Office Employees, Local 11.* See note 88 *supra.* Congress specifically gave the Board the authority to decline jurisdiction over any class of employers. As an example, the Board has refused to exercise jurisdiction over private country clubs as a class. *See* Syracuse Liederkranz, Inc., 166 N.L.R.B. 89 (1967); Denver Athletic Club, 164 N.L.R.B. 677 (1967). In recent years, the Board has reversed some of its prior stances and asserted jurisdiction over some industries once excluded as a class. *See, e.g.,* Cornell University, 183 N.L.R.B. (1970) (jurisdiction asserted over private nonprofit university); Butte Medical Properties, 168 N.L.R.B. (1968) (asserting jurisdiction over hospitals).

[92] One year earlier, in Evans & Kunz, Ltd., 194 N.L.R.B. 1216 (1972), the Board was presented for the first time the opportunity to assert jurisdiction over law firms as a class. In Evans & Kunz, an unfair labor practice charge was filed against an Arizona law firm for discharging three secretaries, allegedly for engaging in concerted activities. *Id.* at 1216. The law firm consisted of four lawyers who practiced law exclusively in the state of Arizona and whose gross revenues exceeded $300,000 a year. The Board adopted the trial examiner's finding that they furnished services in excess of $50,000 a year to clients who met the Board's jurisdictional standards and that the firm therefore fell within the class of employers over which the Board could assert jurisdiction. *Id.* at 1216-17. Adopting the trial examiner's opinion, the Board conceded that many law firms represent out of state clients engaged in interstate commerce and that to decline jurisdiction would place thousands of secretaries, typists and stenographers outside the protection of the Act. *Id.* at 1218. The Board expressed the view, however, that the practice of law was "essentially local in character" and that the exclusion of law firm employees was justified under sec-

Fogel, Julber, Reinhardt & Rothschild,[93] the Teamsters[94] attempted to organize a unit composed of the seven associates and the clerical employees of a five partner law firm in California.[95] The Board initially noted that it has never exercised jurisdiction over law firms,[96] and that while the law firm in question fell within NLRB jurisdictional guidelines[97] the Board would look beyond the amount of business the firm did to determine whether to assert discretionary jurisdiction over it.[98] In reaching its decision, the Board examined two factors in particular: the effect law firms have on commerce[99] and the unique confidentiality considerations involved.[100] Examining the effect a labor dispute involving law firms would have on commerce, the Board contrasted the legal profession with other professions deemed more closely connected with interstate commerce:

> A law firm, in short, is not itself engaged in the production, distribution, or sale of goods in commerce. It renders advice and services directly related to the law rather than to com-

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tion 14(c)(1) because any labor dispute involving them would not be "sufficiently substantial to warrant exercise of its jurisdiction." *Id.* The Board next found that while the secretaries were not technically confidential employees within the Board's own definition of that term, see note 34 *supra,* that "the exercise of jurisdiction over law firms could lead to problems and conflicts with the well-established absolute privilege covering attorney-client communications, which privilege customarily encompasses secretaries and stenographers privy to such communications." 194 N.L.R.B. at 1218 (footnote omitted). The Board also adopted the trial examiner's finding that the attorney-client privilege would be subject to violation if a law firm employer were compelled to produce commerce data to the Board or to produce evidence in defense of an unfair labor practice charge. *Id.* Although the Board declined to extend jurisdiction to this particular law firm, it specifically retained the option of doing so in the future, stating that "[o]ur decision herein is limited solely to the facts of the instant case and not to law firms as a class." *Id.* at 1216 (footnote omitted).

[93] 206 N.L.R.B. 512 (1973).

[94] Teamsters Automotive Workers, Local 495, petitioned the NLRB for a representation election and a competing union, the Office and Professional Employees International Union, Local 30, joined in the request. *Id.* at 512.

[95] *Id.*

[96] "During the over three and one-half decades of this Board's existence we have never seen fit to exercise jurisdiction over law firms." *Id.*

[97] The parties stipulated that the firm grossed over $500,000, of which more than $50,000 was from services provided to clients who fell within the Board's jurisdictional standards. *Id.* The Board therefore noted that the assertion of jurisdiction over this employer was within their power if they so desired. *Id.* at 512-13.

[98] *Id.* at 512-13.

[99] *Id.* at 513.

[100] *Id.* at 513-14.

> merce, and is thus distinguishable from entities such as engineering firms, architectural firms, or advertising firms, whose services relate directly to commerce—i.e. manufacturing, construction and sales activity. Thus, the law firm's connection with the flow of commerce is incidental, and its primary services relate to law, not commerce or commercial activity.[101]

The Board concluded: "The probability that a stoppage of business resulting from labor strife in this or any other law firm would substantially affect commerce is not, we have concluded, sufficiently great to warrant our asserting jurisdiction over law firms."[102]

The Board next addressed the issue of whether law firms should be excluded from the Act's coverage because of the delicate attorney-client confidentiality relationship that firms maintain with their clients.[103] The Board was particularly concerned about the privilege in this case because the law firm represented labor organizations who competed with the labor organizations attempting to organize the firm's employees.[104] Envisioning serious conflicts of interest between the loyalty an attorney owes to his client and that which he would owe to the labor union to which he belonged,[105] the Board declined to exercise jursidiction

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[101] *Id.* at 513.

[102] *Id.* "It therefore seems to us improbable that the actions of business organizations, labor organizations, and other entities which are involved in commerce would be in any substantial degree impeded or interrupted by reason of potential labor disputes between their lawyers and the lawyer's employees." *Id.*

[103] *Id.* See notes 33 & 59 and accompanying text *supra.*

[104] 206 N.L.R.B. at 514.

[105] We are given pause by the arguments advanced to us in this case—which arguments are not new to us—that potential conflicts of interest are likely to develop if employees of law firms are to be represented by, and owe a substantial loyalty to, an organization which may well have interests conflicting with those of clients whom the lawyers represent.

Id.

As was noted previously, see notes 33, 59 and accompanying text *supra*, the confidentiality exclusion has traditionally been limited to employees who possess intimate information on their employer's own labor relations and not merely that of their clients. Thus, there is a new confidentiality problem related to labor law firms wherein the associate or clerical may belong to a union that competes with other unions the firm represents. In such cases, the Board should treat this situation as a conflict of interest problem and create a new category of exclusion for such cases. The majority, by confusing the attorney-client privilege with the different concept of confidentiality exemptions under the Act, has probably hindered the future definition of the perimeters of NLRB jurisdiction over law firms.

over law firms as a class.[106]

In a lengthy and well reasoned opinion,[107] the dissenters attacked the majority's conclusion that law firms had little effect on interstate commerce.[108] They observed:

> Without the services of the legal profession, American business as we know it today could not function. The legal profession plays a vital role at all stages from the act of incorporation through the obtaining of licenses . . . the negotiations and preparation of legal contracts . . . . It is more realistic to say that without such services their clients would be unable to engage in such commerce . . . .[109]

The dissent next took issue with the majority's argument concerning the confidential nature of law firms. The dissent noted that the Board had already asserted jurisdiction over the medi-

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[106] 206 N.L.R.B. at 514. The Board also discussed the problem of devising and administering a jurisdictional yardstick for law firms. They felt that existing gross revenue standards would be inapplicable since one firm might make well over the jurisdictional amount doing purely local personal injury litigation while a smaller firm with lower revenues from a patent and trademark practice would have a much greater impact in interstate commerce. *Id.*

[107] The Board was divided 3-2 on this decision; Miller, Kennedy and Jenkins for the majority and Fanning and Penello for the dissent.

[108] *Id.* at 514-16. The dissent noted that the law firm involved represented numerous nationwide and international labor unions as well as a defense contractor in Vietnam, and that it also engaged in the interstate practice of maritime, EEOC and Railway Labor Act law. *Id.* at 514-15.

[109] *Id.* at 515. The dissent also noted that jurisdiction had long been asserted over employers who furnished intangible services to enterprises engaged in interstate commerce. *Id.* at 515 n.10 (citing De Leuw, Cather & Co., 72 N.L.R.B. 191, 194 (1947) (appraisal, investigation, and surveys of property); The Austin Co., 70 N.L.R.B. 851, 865 (1946) (branch engineering office making layouts, blueprints, and specifications); U.S. Testing Co., Inc., 5 N.L.R.B. 696, 701 (1938) (chemical and physical analysis of industrial commodities.)

The dissent also noted that secretaries and clerical employees of law firms were subject to the coverage of the Fair Labor Standards Act even though the jurisdiction of that Act is narrower than that of the NLRA. 206 N.L.R.B. at 517 n.25, (citing WAGE AND HOUR OPINION LETTER No. 49 (November 2, 1961)).

In an interesting example of judicial prognostication, the dissent cited in support of its position that personal services as well as commodities fell within the category of trade, the district court decision in Goldfarb v. Virginia State Bar Ass'n, which had been handed down earlier in 1973. 206 N.L.R.B. at 515 n.6 (citing Goldfarb v. Virginia State Bar Ass'n, No. 75-72-A (D. Va. Jan. 5, 1973)). The Supreme Court's treatment of this case was to form the backbone of the Board's reversal of *Bodle, Fogel* four years later. See notes 114 through 125 and accompanying text *infra.*

cal profession[110] and attorneys in other contexts,[111] and that the innate discipline and paramount allegiance of attorneys to their profession would negate problems of confidentiality.[112] The dissent concluded by stating that the refusal to extend NLRA coverage to law firms, at least in this case, did "monumental injustice to attorneys and to clerical employees employed by law firms."[113]

Very shortly after the Board's decision in *Bodle, Fogel,* however, the concept of the practice of law as a "profession" rather than a "business" was abruptly discarded by the Supreme Court. In 1975, in *Goldfarb v. Virginia State Bar,*[114] the United States Supreme Court[115] held that minimum fee schedules established for specific work by attorneys violated section 1 of the Sherman Act.[116] The petitioners in *Goldfarb* were a husband and wife who, wishing to purchase a house, had been forced to pay the minimum fee established by state and local bar associations for a title examination.[117] After its initial findings that the defendant bar associations[118] had engaged in price fixing[119] affecting interstate commerce,[120] the Court addressed the defendants' contention that the fee schedules were exempt from the Sherman

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[110] 206 N.L.R.B. at 516 (citing Quain and Ramstad Clinic, 173 N.L.R.B. 1185 (1968) and Dr. J. C. Campbell and Dr. Walter Boucher, 157 N.L.R.B. 1004 (1966)).

[111] 206 N.L.R.B. at 516, 517 (citing Lumberman's Mut. Cas. Co., 75 N.L.R.B. 1132 (1948), see notes 17 through 39 and accompanying text *supra,* and Syracuse University, 204 N.L.R.B. 641, 642-44 (1973) (asserting jurisdiction over law school faculty members)).

[112] 206 N.L.R.B. at 517. The dissent also argued that mere difficulty in devising jurisdictional standards to cover law firms was not a sufficient ground upon which to deny jurisdiction. *Id.* (citing Local 761 Int'l Bhd. of Elec. Radio & Machine Workers v. NLRB, 366 U.S. 667, 674 (1961) ("However difficult the drawing of lines more nice than obvious, the statute compels the task" of drawing lines between "primary" and "secondary" picketing)).

[113] 206 N.L.R.B. at 517.

[114] 421 U.S. 773 (1975).

[115] The decision was unanimous with Justice Powell taking no part in the consideration or decision of the case. *Id.* at 774.

[116] *Id.* at 793. Section 1 of the Sherman Act states in part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared illegal. . . ." 15 U.S.C. § 1 (1976).

[117] 421 U.S. at 775-76.

[118] The Virginia State Bar Association and Fairfax County Bar Association were made defendants in the suit. *Id.* at 773.

[119] *Id.* at 781-83.

[120] *Id.* at 783-86.

Act because they involved a "learned profession."[121] The bar associations argued that the practice of a learned profession is not "trade or commerce" under the federal antitrust laws.[122] Rejecting this contention, the Court pointed to the broad scope of the Sherman Act[123] and to the fact that previous decisions included the performing of services within the Act.[124] The Court concluded by drawing the legal profession within the purview of the Sherman Act:

> Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is "commerce" in the most common usage of that word . . . . In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.[125]

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[121] *Id.* at 786-88. The Court also addressed the argument that the fee schedules were immune from Sherman Act coverage because they constituted "state action." *Id.* at 788-92. In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that federal antitrust laws did not apply to actions directed by state governments. *Id.* at 350-51. *See generally* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898 (1977); 49 MISS. L.J. 725 (1978). In rejecting the "state action" immunity claim, the *Goldfarb* Court stated that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was meant to proscribe is whether the activity is *required by the State acting as sovereign.*" 421 U.S. at 790 (emphasis added). The Court concluded that since the legislature did not authorize the bar association to impose competitive restraints on the practice of law, such action was not "required" by the state and was therefore not entitled to the immunity. *Id.* at 790-91. See notes 53 through 57 and accompanying text *supra.*

[122] 421 U.S. at 786 n.15 (citing Federal Club v. National League, 259 U.S. 200, 209 (1922) ("[A] firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State.") and FTC v. Raladam Co., 283 U.S. 643, 653 (1931) ("medical practitioners . . . follow a profession and not a trade. . . ."). See note 60 and accompanying text *supra.*

[123] 421 U.S. at 787 (citing United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) ("language more comprehensive is difficult to conceive")).

[124] 421 U.S. at 787 (citing Radovich v. National Football League, 352 U.S. 445, 447-48 (1957) (holding N.F.L. subject to antitrust laws) and American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943) (medical profession covered by the antitrust laws)).

[125] 421 U.S. at 787-88. The Court did intimate, however, that there may be some facets of the practice of law that do not affect interstate commerce: "Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act." *Id.* at 785-86. Although the Court did not offer any exam-

Two years later, and four years after its initial refusal to assert jurisdiction over law firms,[126] the National Labor Relations Board reversed itself and asserted jurisdiction over law firms as a class of employers.[127] In *Foley, Hoag & Eliot,*[128] a union[129] filed a petition to represent the file clerks and messengers employed by the Boston law firm of Foley, Hoag & Eliot.[130] The firm employed approximately 150 individuals, including about 60 attorneys. It grossed over $500,000 annually and about 85% of its services were for clients who fell within the jursidictional boundaries of the Act.[131] The Regional Director dismissed the petition under authority of the recent Board decision in *Bodle, Fogel*[132] and the union appealed.[133] In an opinion that drew extensively upon the dissenting opinion in *Bodle, Fogel,*[134] the Board reasoned that law firms exerted a substantial influence on interstate commerce[135] and that "the impact on commerce resulting from the disruption of a law firm's operations by labor strife was not different from that resulting from the disruption of the operations of other service enterprises over which the Board presently asserted jurisdiction."[136] Relying on the Supreme Court's decision in *Goldfarb* that the legal profession has an effect on commerce within the meaning of the Sherman Act,[137] and noting that the same rationale was applicable to the word "commerce" as used

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ples of legal services that are unconnected with interstate commerce, one Board decision suggested that the practice of purely local personal injury cliams might be unconnected. Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 514 (1973). See notes 93 through 113 and accompanying text *supra.*

[126] Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512 (1973).

[127] Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977). Of the original majority, Miller and Kennedy were no longer on the Board. Jenkins and the two new members of the Board, Walther and Murphy, sided with the original dissenters, Fanning and Penello, to make the assertion of NLRB jurisdiction over law firms a unanimous decision. 229 N.L.R.B. at 456; *See* Note, *The Unionization of Law Firms,* 46 FORD. L. REV. 1008, 1017-19 (1978).

[128] 229 N.L.R.B. 456 (1977).

[129] The United File Room Clerks and Messengers of Foley, Hoag & Eliot. *Id.* at 456.

[130] *Id.*

[131] *Id.*

[132] See notes 93 through 113 and accompanying text *supra.*

[133] 229 N.L.R.B. at 456.

[134] 206 N.L.R.B. at 514-17. See notes 107 through 113 and accompanying text *supra.*

[135] 229 N.L.R.B. at 456-57.

[136] *Id.* at 456.

[137] See notes 114 through 125 and accompanying text *supra.*

in the National Labor Relations Act,[138] the Board for the first time asserted jurisdiction over law firms as a class.[139] Although the issue of confidentiality played a major role in the Board's prior decision to decline jurisdiction over law firms,[140] it was relegated to a footnote in *Foley, Hoag & Eliot.*[141] The two new Board members, although voting with the majority, argued that law firm employees who handled the labor relations of the firm's clients were performing the function of labor relations officials for the client and were thus subject to exclusion under the confidentiality exemption engrafted upon the Act.[142]

The Board issued three other decisions in 1977 affecting NLRB jurisdiction over law firms, each of which dealt with Legal Services Corporation employees. In *Wayne County Neighborhood Legal Services, Inc.,*[143] the Board was faced with the issue of whether a nonprofit corporation[144] providing legal services to indigent clients was sufficiently analogous to a private law firm to warrant assertion of jurisdiction under the rule announced in *Foley, Hoag & Eliot.*[145] The Board initially noted that the Legal Services Corporation was not an agency of the federal government[146] and was not therefore entitled to exemption from the

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[138] 229 N.L.R.B. at 457. The Board stated:

> With regard to the case at hand, the Board is convinced that the holding of the Supreme Court in *Goldfarb* is equally applicable to the word "commerce" as used in Section 2(6) and (7) of the Act, for as the Board recently stated in *Van Camp Sea Food Co.*, [212 N.L.R.B. 537, 537 (1974)] "in regulating labor relations under the Act, the Congress intended to exercise fully the same plenary and comprehensive commerce power which it had exercised in regulating commerce under the Sherman Act."

229 N.L.R.B. at 457 (footnote omitted).

[139] *Id.* The Board stated: "Since it is clear that law firms, as a class, do have a substantial impact on interstate commerce, we shall assert jurisdiction over them as required by Section 14(c) of the Act, subject to their meeting the appropriate jurisdictional standard which will be determined in the Board's posthearing decision." *Id.* (footnote omitted).

[140] See note 33 *supra.*

[141] 229 N.L.R.B. at 457-58 n.12.

[142] *Id.* See note 33 *supra.*

[143] 229 N.L.R.B. 1023 (1977).

[144] Wayne County Neighborhood Services, Inc. is a nonprofit Corporation providing legal aid to indigent clients in Wayne County, Michigan. It is funded by the Legal Services Corporation, which disburses federal funds to such organizations providing legal services to the poor. *Id.* at 1023.

[145] *Id.* See notes 127 through 142 and accompanying text *supra.*

[146] 229 N.L.R.B. at 1023. The Legal Services Corporation was established by the Le-

NLRA.[147] Although the corporation had to meet certain requirements under the Legal Services Corporation Act, including submission of an annual budget,[148] it was completely autonomous with respect to its operating procedures, including the terms and conditions of employment for its employees.[149] The Board further noted that "[t]he only apparent differences between the Employer and a private law firm are that all attorneys receive an annual salary as opposed to sharing in the firm's profits, and the Employer, rather than being paid for services rendered, is annually funded independently of the clients represented."[150] Considering the funds spent in interstate commerce,[151] the Board determined that the corporation received over one million dollars

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gal Services Corporation Act of 1964, Pub. L. No. 88-452, Title X, as added Act of July 25, 1974, Pub. L. No. 93-355, § 2 (codified as amended at 42 U.S.C. §§ 2996-2996(1) (Supp. 1979)), which provides that "the [C]orporation is not an agency, department, or instrumentality of the Federal Government . . . and its officers and employees are not employees of the Federal Government." 229 N.L.R.B. at 1023.

[147] *Id.* The United States or any wholly owned corporation of the United States is not an "employer" within the meaning of the Act and is therefore exempt from its coverage. 29 U.S.C. § 152(2) states in part: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation. . . ."; *see* International Longshoremen's and Warehousemen's Union v. Inland Waterways Corp., 35 So. 2d 425, 426 (La. 1948) (exempting the government-owned Inland Waterways Corporation from coverage under the Taft-Hartley Act).

Although excluded from the coverage of the National Labor Relations Act, federal employees do have the right to join labor organizations. This right was first given to certain federal employees in 1912 with the enactment of the Lloyd-La Follette Act, Pub. L. No. 62-336, 37 Stat. 539, 555 (codified at 5 U.S.C. § 7101 (1976), which allowed postal service employees to join unions). In 1962, President Kennedy signed Executive Order 10,988 into effect. This Order specifically authorized federal employees in the administrative branch to organize and bargain with management. EXEC. ORDER No. 10,988, 3 C.F.R. 521 (1959-63 Comp.) (revoked 1969). These rights were strengthened in 1969 with the issuance by President Nixon of Executive Order 11,491. EXEC. ORDER No. 11,491, 3 C.F.R. 191 (1969). This order was amended by Executive Orders 11,616 and 11,838. There were, as of 1974, some 11,000 attorneys in executive agencies in the federal government. Poirier, *supra* note 62, at 1541. *See also* Comment, *The Unionization of Attorneys,* 71 COLUM. L. REV. 100, 108-11 (1971) (discussing the right of governmental attorneys to join unions).

[148] 229 N.L.R.B. at 1023. The Corporation could not handle certain types of cases and had to receive approval for expenditures above a certain level. *Id.* at 1023, 1023 nn.3 & 4.

[149] *Id.* at 1023. The Corporation as employer had full authority to establish overtime, sick leave, work hours, vacation rights and insurance benefits for its employees and it had full control over the hiring, firing and salaries of its staff. *Id.*

[150] *Id.* (footnote omitted).

[151] *Id.* at 1023-34.

annually from the Legal Services Corporation and expended over $52,000 purchasing goods and services from out of state companies.[152] Based on these findings the Board concluded: "[t]he Employer's operations would clearly satisfy whatever jurisdictional standards we might subsequently adopt as appropriate for law firms . . . ."[153] Finally, the Board ruled that the appropriate bargaining unit would consist of all staff attorneys, including recent law school graduates who had not yet been admitted to the bar.[154]

Shortly after *Wayne County* was decided, a similar employer, Legal Services for Northwestern Pennsylvania, petitioned for an advisory opinion on whether the Board would assert jurisdiction over it.[155] The petitioner was a nonprofit, governmentally funded[156] corporation established to serve the legal needs of low income clients in twelve counties in Northwestern Pennsylvania,[157] with an annual budget of $850,000.[158] In a brief opinion that cited *Foley, Goldfarb,* and *Wayne County,*[159] the Board issued its opinion that the petitioner was subject to coverage under the Act.[160]

Finally, in *Camden Regional Legal Services, Inc.,*[161] the Board established the jurisdictional test to be used in deciding

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[152] 229 N.L.R.B. at 1023-24. During the 1975-1976 fiscal year, the Corporation received $1,300,000 from the Legal Services Corporation and expended $4,500 on law books from Texas and $52,000 on goods and services from companies such as I.B.M., Xerox and A.B. Dick. *Id.*

[153] *Id.* at 1024.

[154] *Id.* The Corporation contended that the recent graduates lacked a community of interest with the other attorneys. *Id.* The Board observed that the graduates performed the same duties as licensed attorneys, the only distinction being that the nonlicensed attorneys could not appear in appellate courts and all pleadings they drew had to be signed by a practicing attorney. *Id.* The Board also noted that they had previously included in bargaining units recent graduates of professional schools awaiting licensing. *Id.* at 1024 n.8 (citing Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1049 (1971) (nonlicensed architects included in bargaining unit) and Fisher-Friedman Associates, 192 N.L.R.B. 925 (1971) (same)).

[155] Legal Services for Northwestern Pennsylvania, 230 N.L.R.B. 688 (1977).

[156] *Id.* at 688. The petitioner received 25% of its funds from the state of Pennsylvania and 75% from the federal government. *Id.* at 688 n.2.

[157] *Id.* at 688.

[158] *Id.*

[159] *Id.* at 688-89.

[160] *Id.* at 689.

[161] 231 N.L.R.B. 224 (1977).

whether jurisdiction should be asserted over a given law firm.[162] The Board found that the nonprofit corporation providing legal services to indigents[163] had a gross annual revenue of $900,000[164] and expended over $50,000 annually for goods and services from such companies as IBM, Xerox, Bell Telephone, National Telephone Systems, Prudential Insurance Company and West Publishing Company.[165] Relying on empirical data from the Bureau of the Census[166] and American Bar Foundation publications[167] the Board declared that the purpose of the Act would best be effectuated by the assertion of jurisdiction over law firms and legal assistance programs that received at least $250,000 in gross annual revenues.[168]

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[162] *Id.* at 224.

[163] *Id.* Like the legal aid corporations in *Wayne County* and *Northwestern Pennsylvania,* Camden Regional Legal Services, Inc., was funded primarily by the Legal Services Corporation. *Id.* A small portion of its funding came from the state of New Jersey, various county governments and county bar associations, and certain charities. *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 224 & n.4 (citing BUREAU OF THE CENSUS, U.S. COMMERCE DEPARTMENT, CENSUS OF SELECTED SERVICE INDUSTRIES, LEGAL SERVICES, vol. 1, SUMMARY AND SUBJECT STATISTICS, 425, table 1 c. (1976)).

[167] 231 N.L.R.B. at 224 & n.5 (citing AMERICAN BAR ASSOCIATION, THE 1971 LAWYER STATISTICAL REPORT, 10-12 tables 5 & 6 (1972)).

[168] 231 N.L.R.B. at 224. Pursuant to a stipulation entered into by the partners, the Board designated the appropriate unit as "[a]ll paralegal employees, secretaries, receptionists, clerks, assistant bookkeeper, and clerical assistant." *Id.*

Since *Camden,* the Board has decided two more cases involving jurisdiction over law firms. In Legal Services for the Elderly Poor, 236 N.L.R.B. No. 44, 98 L.R.R.M. 1237 (1978), the Board asserted jurisdiction over another nonprofit organization funded by the Legal Services Corporation that provided legal services to indigents. The Board designated separate bargaining units for the corporation's attorneys and nonprofessionals, finding that they had separate interests. 98 L.R.R.M. at 1240. In addition, the Board excluded four law student interns from coverage altogether, holding that they did not meet the statutory criteria for professional employees and lacked a significant community of interest with the clerical employees. *Id.* at 1240 n.15. For a discussion of the criteria for porfessional employees, see notes 13 through 16 and accompanying text *supra.*

In the second case, Neighborhood Legal Services, Inc., 236 N.L.R.B. No. 154, 98 L.R.R.M. 1414 (1978), the Board asserted jurisdiction over yet another Legal Services Corporation-funded organization. After a detailed examination of the confidential and managerial aspects of some of the employees, the Board designated a unit consisting of staff attorneys, paraprofessionals and clerical employees. 98 L.R.R.M. at 1421. Since the unit contained nonprofessionals as well as professionals, the Board ordered a separate vote pursuant to 29 U.S.C. § 159(6)(1) (1973) to determine if the professionals wished to be included in a unit with nonprofessionals. *Id.* See notes 14 and 46 and accompanying text *supra.*

IV. Considerations for the Legal Profession

Now that the NLRB has declared the National Labor Relations Act applicable to attorneys[169] and employees of law firms[170] in general, and the ABA has to a certain extent acquiesced with regard to the organizational rights of attorneys,[171] the right of these employees to join unions is assured. The question of whether an individual attorney, clerical employee or paralegal should join a union depends, of course, upon the particular situation. Not every employer-employee relationship calls for the formation of a union. In many situations, particularly in smaller or moderate-sized firms[172] where there is close contact between the partner-employers and the associates and clerical staff, job conditions and grievances can be ironed out satisfactorily without formal collective bargaining and arbitration proceedings. Also, the position of associates in small to moderate-sized firms is much different from that of attorneys employed by large corporations[173] or large law firms.[174] While it may be plausibly argued that the attorneys in the latter case have only nominal expectations of moving into the ranks of management, the associate in a small to moderate-sized firm in many cases fully expects to become a partner and therefore a member of management within a few years. His interests are attuned to those of management much more so than are those of the employee without such expectations. Therefore, the attorney in a small to moderate-sized firm is much less likely to find unionization appealing.

Assuming that an organizational attempt is underway at a law firm, certain rights and obligations of the parties should be understood. The following areas, although only briefly set forth here, encompass some of the more important considerations involved in unionization generally and of the legal profession in particular.

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[169] See notes 13 through 52 and accompanying text *supra*.
[170] See notes 79 through 168 and accompanying text *supra*.
[171] See notes 53 through 77 and accompanying text *supra*.
[172] For instance, law firms with fewer than forty associates.
[173] See note 7 *supra*.
[174] *Id.*

A. Closed Shop v. Right to Work

Title 29, Section 164(b) of the United States Code provides that nothing in the NLRA authorizes the execution of agreements that compel union membership as a prerequisite of employment in states that have "right to work" laws.[175] For better or worse, depending on one's viewpoint, Mississippi is a "right to work" state. By constitutional provision,[176] stat-

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[175] "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law." 29 U.S.C. § 164(b) (1976).

This reservation of power to the states has been upheld on numerous occasions. *See, e.g.*, Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 102-03 (1963); *cf.* AFL v. American Sash & Door Co., 335 U.S. 538, 541-42 (1948). Right to work laws have been upheld under challenges based on equal protection, due process, peaceable assembly and petition, free speech, and the contract clauses. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 529-37 (1948). For a unique application of "closed shop" v. "right to work" analysis, see In re Integrating the Bar, 259 S.W.2d 144, 151 (Ark. 1953) (holding an integrated bar is not a "closed shop" labor union).

[176] MISS. CONST. art. 7, § 198-A (1960) provides:

> It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reason of such denial or deprivation of employment.
>
> The provisions of this section shall not apply to any lawful contract in force on the effective date of this section, but they shall apply to all contracts thereafter entered into and to any renewal or extension of an existing contract thereafter occurring. The provisions of this section shall not apply to any employer or employee under the jurisdiction of the Federal Railway Labor Act.

ute[177] and case law,[178] Mississippi has insured the right of its workers to attain and maintain employment without being subjected to involuntary union membership.

Generally speaking, an employer in Mississippi may hire or fire anyone he pleases for any reason, so long as he does not do so for a reason prohibited by the National Labor Relations Act,[179] or other statute.[180] He does not have to worry about a labor union's controlling his hiring practices.

B. Solicitation

The employer may prohibit organizational solicitation during working time[181] and may discharge employees who are soliciting for a union.[182] The basis of this right is management's concern in maintaining productivity and job safety. Although the employer may not, in most cases, ban solicitation in non-working areas[183] or during non-working hours,[184] special consideration is given to some businesses where interaction between employees and customers is common. For example department stores[185] and restaurants[186] may validly enforce a no-solicitation rule that prohibits solicitation in working areas, even during non-working time, because of the likelihood that customers would be present and overhear the solicitation.

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[177] MISS. CODE ANN. § 71-1-47 (1972) (setting out the substance of the constitutional provisions against "closed shops").

[178] *See, e.g.*, Hattiesburg Bldg. & Trades Council v. Broome, 247 Miss. 458, 481-92, 153 So. 2d 695, 705-10 (1963) (picketing to force employer to hire only union members is unlawful and may be enjoined) *rev'd on other grounds*, 377 U.S. 126 (1964).

[179] *See* N.L.R.B. v. Standard Oil Prod. Co., 224 F.2d 465, 470 (1st Cir.) *cert. denied*, 350 U.S. 902 (1955).

[180] *See* Coppage v. Kansas, 236 U.S. 26 (1915) and Adair v. United States, 208 U.S. 161, 174-75 (1980), *overruled on other grounds*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

[181] *See* NLRB v. Whitfield Pickle Co., 374 F.2d 576, 578-79 (5th Cir. 1967); Jas. H. Matthews & Co. v. NLRB, 354 F.2d 432, 435-36 (8th Cir. 1965), *cert. denied*, 384 U.S. 1002 (1966).

[182] *See* Mason & Hanger-Silas Mason Co. v. NLRB, 405 F.2d 1, 4-6 (5th Cir. 1968); Wah Chang Corp. v. NLRB, 305 F.2d 15, 17-18 (9th Cir. 1962).

[183] *See* NLRB v. Ertel Mfg. Corp., 352 F.2d 916, 920 (7th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966).

[184] *See* Blake, Moffitt & Zowne, 214 N.L.R.B. 859 (1974).

[185] *See* Montgomery Ward & Co., 145 N.L.R.B. 846, *enforced as modified on other grounds*, 339 F.2d 889 (6th Cir. 1965).

[186] *See, e.g.*, Marriott Corp., 223 N.L.R.B. 978 (1976).

Because of the constant close relationship between attorneys and their clients, a no-solicitation rule seems particularly applicable to law firms. Thus, a law firm should be able to enforce such a rule as long as it applies to all solicitation and does not single out union activities.

C. *Strikes*

Although neither the Board nor the courts have addressed the issue of the right of attorneys to strike, the stance of the ABA is clear. In Informal Opinion No. 986,[187] the ABA committee expressly forbade attorneys to strike or withhold services in any other way. While it seems that unionized attorneys would not have the right to strike, nothing would prevent the nonprofessional clerical employees from doing so as long as the strike itself was not in violation of NLRA mandates.

D. *Confidentiality*

The bearing of the unique confidentiality factor inherent in the practice of law upon attorneys' labor rights has not yet been fully resolved. Whenever an attorney belongs to a labor union that is attempting to organize a client of that attorney's firm or has any other interest contrary to that of the attorney's client, a severe conflict of interest could develop. By nature of his relationship with the client, the attorney could very well have information regarding profits, mergers, relocations of plant facilities or a myriad of other data which, although protected by confidential attorney-client privileges, would nonetheless be most useful to his union. The traditional NLRA exclusion of confidential employees[188] would serve only to exclude attorneys who handle the labor relations of their own firm or corporation. The modified view of the confidential employee exemption taken by Board members Walther and Murphy in *Foley, Hoag & Eliot*[189] would simply extend the exclusion to labor law attorneys who handle labor relations for their clients. Clearly, neither of these approaches under the Board's current confidential employee ex-

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[187] See notes 70, 71 and accompanying text *supra*.

[188] See note 33 and accompanying text *supra*.

[189] See note 142 and accompanying text *supra*.

emption deals adequately with the vast majority of situations that could arise in non-labor law firms. What is needed is a realistic examination by the Board of the true source of confidentiality conflicts in the context of unionized attorneys and the development of more workable criteria concerning confidentiality conflicts for the inclusion or exclusion of attorneys from unions.

V. Conclusion

The decision of whether to join a union must of course be left to the individual attorney. It is hoped that the foregoing has shed some light on the area of legal unionization and has helped in informing practitioners of the important issues, ethical and otherwise, that should be considered in making that decision.

Richard T. Starrett

RECENT DECISIONS

Constitutional Law—First Amendment—State May Prohibit Optometrists' Use of Trade Names As Inherently Misleading Form of Commercial Speech

Dr. Rogers, other commercial optometrists[1] and the Texas Senior Citizens Association (TSCA) brought a civil action against the professional optometrists on the Texas Optometry Board[2] to enjoin the enforcement of four regulations promulgated under the Texas Optometry Act,[3] claiming that the provisions infringed their first and fourteenth amendment rights.[4] Plaintiffs specifically asserted that article 4552-5.13(d), proscribing the use of trade names, violated their right to exercise freedom of commercial speech guaranteed by the first amendment.[5]

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[1] "An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses." Williamson v. Lee Optical, 348 U.S. 483, 486 (1955).

[2] The Texas Optometric Association joined the proceedings as an intervening defendant.

[3] Tex. Rev. Civ. Stat. Ann. art. 4552-2.02, -5.09(a), -5.13(d), -5.15(e) (Vernon 1976).

[4] Plaintiffs successfully challenged the constitutionality of art. 4552-5.09(a), which proscribed advertisements of prices for ophthalmic services. Rogers v. Friedman, 438 F. Supp. 428, 429 (E.D. Tex. 1977). Their equal protection and due process objections to regulations under art. 4552-5.15(e) of optometrists' referrals of patients to opticians, however, were rejected. 438 F. Supp. at 431-32. These holdings were not appealed by the parties. Plaintiffs also contested the constitutionality of art. 4552-2.02, which required that a minimum of two-thirds of the Texas Optometry Board be affiliated with the Texas Optometric Association. The district court upheld the constitutionality of the provision, concluding that there was a rational basis for the legislation, *i.e.*, to prevent corruption and to ensure strict enforcement of the Texas Optometry Act. 438 F. Supp. at 432-33. On appeal to the Supreme Court, the ruling concerning art. 4552-2.02 was affirmed. Friedman v. Rogers, 99 S. Ct. 887, 898 (1979). The intervening plaintiffs, TSCA, asserted as members of the consuming public a first amendment right to receive commercial information about optometrical services. *Id.* at 892-93.

[5] Tex. Rev. Civ. Stat. Ann. art. 4552-5.13(d) (Vernon 1976) provides: "No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . . " The Texas Optometry Act, designed "to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship," *id.* art. 4552-5.13(a), does not ban optometrists' partnerships or the employment of one optometrist by another. *Id.* art. 4552-5.13(d). If an optometrist is employed by another optometrist or a partnership, the employee "may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom" he is employed. *Id.* Article 4552-5.13(c), supplemented by art. 4552-5.13(g), indicates that an optometrist may not use his own name to advertise in any office unless he works in that office one-half of the total time he spends in practice or, alternatively, one-half of the time during which that office is in operation for nine months of the year.

Defendants, on the other hand, maintained that the use of trade names was inherently misleading, that the names were used to conceal important information from patients,[6] and that the commercialization of the profession adversely affected both the doctor-patient relationship and the quality of optometrical services. The district court struck down article 4552-5.13(d) as an unconstitutional restraint on the free flow of commercial information, reasoning that by the use of trade names optometrists impart to consumers valuable data concerning certain standards of quality and price.[7] On appeal to the United States Supreme Court, *held*, reversed. Where a party engaged in a profession employs a trade name for commercial purposes, the states, in balancing the relevant interests, may afford such commercial speech less than full first amendment protection to guard the consuming public from deceptive and misleading practices. *Friedman v. Rogers*, 99 S. Ct. 887 (1979).

The first amendment freedoms of speech, press and religion are protected by the due process clause of the fourteenth amendment from infringement by the states.[8] In efforts to preserve and promote freedom of speech the Supreme Court has frequently permitted litigants challenging the constitutionality of legislation to invoke the overbreadth doctrine,[9] according to which plaintiffs must show merely that the law in question may inhibit constitutionally protected speech. Thus, a particular litigant's speech need not fall within the category of protected

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[6] Defendants relied heavily on an earlier case in which the Texas Supreme Court had noted that Rogers was operating 82 shops throughout the state under the trade name Texas State Optical or TSO. Defendants alleged that the advertising for the shops had been designed to create the impression that either Rogers or his brother was working at a particular office, when in fact Rogers had never even entered several of the shops. Texas State Bd. of Examiners v. Carp, 412 S.W.2d 307, 312 (Tex.), *appeal dismissed and cert. denied*, 389 U.S. 52 (1967).

[7] Rogers v. Friedman, 438 F. Supp. 428, 431 (E.D. Tex. 1977).

[8] *See* Cantwell v. Connecticut, 310 U.S. 296, 302-03 (1940) (holding Connecticut statute placing restrictions on the right to solicit for religious purposes unconstitutional under the due process clause); Grosjean v. American Press Co., 297 U.S. 233, 244, 249 (1936) (holding Louisiana's imposition on newspapers of a license tax for engaging in advertising unconstitutional under the due process clause of the fourteenth amendment, which precludes states from placing any form of prior restraint on the freedom of the press); Near v. Minnesota, 283 U.S. 697, 722-23 (1930) (holding Minnesota statute allowing suppression of a newspaper or periodical in which scandalous material was published unconstitutional as an infringement on freedom of the press guaranteed through the fourteenth amendment).

[9] This doctrine permits "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

communication for the statute to be deemed unconstitutional.[10] Despite the apparent liberality of the doctrine, the Supreme Court has emphasized that limitations on first amendment rights may be justified if and when "more important interests" exist.[11] For example, the Supreme Court has repeatedly upheld the constitutionality of state laws that regulate the time, place and manner of first amendment activity.[12] The

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[10] *See* Gooding v. Wilson, 405 U.S. 518, 520-22 (1972) (antiwar demonstrators successfully challenged, on overbreadth grounds, statute making use of "opprobrious words" a misdemeanor); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (statute requiring public school teachers to list every organization with which they had been affiliated held an unconstitutional infringement on first amendment rights of association under the overbreadth doctrine); Lovell v. Griffin, 303 U.S. 444, 451 (1938) (ordinance prohibiting distribution of literature without a license held to be overly broad and an unconstitutional infringement on freedom of the press); Herndon v. Lowry, 301 U.S. 242, 264 (1937) (statute outlawing solicitation of members for a political party whose purpose was resistance to organized government held an unconstitutional infringement on freedom of speech and assembly under the overbreadth doctrine). In recent years, however, the Court has narrowed the scope of the overbreadth doctrine, excluding commercial speech and conduct from its protective compass. *See* Bates v. State Bar, 433 U.S. 350, 380-81 (1977) (overbreadth doctrine does not apply to the ordinary commercial context as it appears unlikely that commercial speech is susceptible to infringement by an overly broad statute or regulation); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (where conduct and not merely speech is involved, the overbreadth of the statute must be real and substantial to justify invalidation under the overbreadth doctrine).

[11] Roth v. United States, 354 U.S. 476, 488 (1957) (sustaining conviction under statute prohibiting the mailing of obscene literature). "[T]he Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom." Gitlow v. New York, 268 U.S. 652, 666 (1925).

[12] *See* Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972) (city may regulate picketing around school); Colten v. Kentucky, 407 U.S. 104, 109-10 (1972) (to ensure public safety, state may prohibit congregating on highway); United States v. O'Brien, 391 U.S. 367, 377 (1968) (no first amendment protection for burning draft card; substantial governmental interest in efficient administration of registration system); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (reasonable regulation of sound trucks on public streets did not violate freedom of speech); Cox v. New Hampshire, 312 U.S. 569, 574-75 (1941) (state may impose restrictions on time, place and manner of public parades and processions in its streets for the protection of the public and to control traffic); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (state may by "general and nondiscriminatory legislation regulate the times, the places and the manner of soliciting upon its streets and of holding meetings thereon"); Schneider v. State, 308 U.S. 147, 165 (1939) (states may enforce regulations prescribing a reasonable time, place and manner of soliciting and canvassing).

In testing the legitimacy of statutes that regulate speech, the Court generally balances the governmental interest in regulation against the speaker's first amendment right to communicate, and determines whether the regulation unduly infringes upon a fundamental right or is a reasonable exercise of governmental control under the circumstances. The Court has emphatically stated, however, that restrictions may not be imposed on the basis of the content of the speech. *E.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205,

Court has also refused to extend full first amendment protection to obscenity,[13] fighting words,[14] speech that incites audiences to commit crime,[15] and libel.[16]

Statutes regulating commercial speech have in the past been subjected to varying standards of review by the Supreme Court.[17] Initially, the primary purpose of a communication determined the extent of the first amendment protection to which it was entitled. Thus, reasonable regulations of commercial expression were consistently upheld in cases involving activities prompted by pecuniary rather than religious or political motives.[18] In *Valentine v. Chrestensen*,[19] for example, the enter-

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208-12 (1975); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972). Despite the prohibition against content-based classifications of speech, the Supreme Court has upheld zoning ordinances directed at the relocation of theatres presenting "sexually explicit" movies. Young v. American Mini Theatres, Inc., 427 U.S. 50, 60-61, (1976). For a thorough discussion of zoning and its relationship to the first amendment, see *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1550-68 (1978).

[13] Miller v. California, 413 U.S. 15, 23-24 (1973) (5-4 decision) (state may ban material that appeals to prurient interest, is patently offensive and lacks redeeming social value); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity is not within the area of constitutionally protected speech or press).

[14] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" have never been afforded constitutional protection).

[15] Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam) (although a state may not forbid " 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence,' " it may forbid speech or advocacy that is intended to incite or produce imminent lawless activity and that is likely to incite or produce such activity); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (5-4 decision) (states may forbid speech that is "likely to produce a clear and present danger or a serious substantive evil that rises far above public inconvenience, annoyance, or unrest").

[16] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (false statements of fact have no constitutional value and are unworthy of constitutional protection); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (libel can claim no special immunity from constitutional limitations); Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952) (5-4 decision) (libel has never been granted constitutional protection).

[17] *See generally* 61 CORNELL L.Q. 640, 646-47 (1976) (noting recent expansion of protection for advertising that serves public interest); 4 HASTINGS CONST. L.Q. 321, 358-59 (1977) (advocating a standardized level of protection for speech); 24 N.Y.L. SCH. L. REV. 225, 230-37 (1978) (tracing evolution of different tests applied to commercial speech).

[18] *Compare* Breard v. City of Alexandria, 341 U.S. 622, 641-42 (1951) (local ordinance banning door-to-door solicitation by salesmen upheld; privacy interest outweighed rights to solicit magazine sales) *and* Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (per curiam) (state could constitutionally ban billboard advertisements of cigarettes) *with* Murdock v. Pennsylvania, 319 U.S. 105, 108-11 (1943) (license tax on solicitation violated petitioners' rights to express religious beliefs) *and* Jamison v. Texas, 318 U.S. 413, 414 (1943) (handbills advertising sale of religious books protected by first amendment) *and* United States v. Silberman, 464 F. Supp. 866, 871-72 (M.D. Fla. 1979) (selling flowers as expression of religious conviction constitutionally protected).

[19] 316 U.S. 52 (1942).

prising petitioner had attempted to circumvent a local ordinance banning commercial handbills by appending a political statement to his advertisements for submarine tours. Scrutinizing the petitioner's motives, the Court ruled that the handbills were not protected by the first amendment.[20]

This standard of review yielded eventually to the stricter public interest test with the Court's ruling in *New York Times Co. v. Sullivan.*[21] The Court held in that case that allegedly defamatory statements published by the defendant newspaper were not divested of first amendment protection merely because they appeared in a paid advertisement.[22] Because the statements conveyed a political message,[23] however, the level of review applicable to pure commercial speech remained uncertain. Nevertheless, after *New York Times* it was clear that the Court had shifted its focus from the speaker's need to communicate to the public's interest in receiving vital information.[24] The rationale of the *New York*

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[20] *Id.* at 54-55. Although the Court cited no authority for its affording minimal first amendment protection to commercial speech, *see id.*, the *Valentine* decision was said by some to stand for the proposition that the states' regulations of commercial speech would not be questioned, and that the courts would defer to the judgment of the states regarding the reasonableness of the controls.

Two later cases further illustrate the Court's application of the primary purpose test. In Martin v. City of Struthers, 319 U.S. 141 (1943), the Court determined that an ordinance proscribing door-to-door circulation of leaflets violated petitioner's first amendment freedoms of speech and religion. *Id.* at 149. In that case, the ordinance effectively prevented the petitioner's accomplishing her primary purpose of advertising a religious meeting. *Id.* In a later case, Breard v. City of Alexandria, 341 U.S. 622 (1951), the Court concluded that a magazine salesman's right to solicit door-to-door was not protected by the first amendment. *Id.* at 641-42. Though the ordinances in the two cases were virtually identical, the motives of the respective petitioners were substantially different. Since the salesman in *Breard* did not intend to make a political statement or to express his religious views, his freedom of commercial speech was limited under the primary purpose test. The precedential value of *Valentine* was emasculated by Justice Douglas' remark that the language in the decision "was casual, almost offhand. And it has not survived reflection." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

[21] 376 U.S. 254 (1964); *accord*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973) (5-4 decision) (newspaper could not use sex-designated want ads in violation of city ordinance).

[22] 376 U.S. at 266.

[23] The action was instituted by Sullivan, the police commissioner of Montgomery, Alabama, who maintained that he had been defamed by the advertisement recounting the mistreatment of blacks by police. The full-page advertisement also solicited contributions for the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." *Id.* at 256-58.

[24] Many scholars heralded the *New York Times* decision as a recognition and adoption of the public speech theory propounded by the foremost champion of the first amendment, Alexander Meiklejohn. The essence of Meiklejohn's theory is that all speech concerning public issues deserves first amendment protection because it promotes self-

Times decision was reiterated several years later in *Bigelow v. Virginia.*[25] Appealing his conviction for having published an advertisement for out-of-state abortion referral services, petitioner contended that truthful advertisements concerning legal activities[26] could not be suppressed in the absence of a compelling state interest. Reversing Bigelow's conviction, the Court stated unequivocally that speech could not be stripped of first amendment protection simply because it was linked with commercial activity.[27] As in *New York Times,* the Court suggested that since the publication communicated information of potential public interest and value,[28] it merited a greater degree of protection than would purely commercial speech.[29]

The Supreme Court's application of the public interest test indicated that the public's right to receive information was on at least an equal footing with the speaker's right to deliver the message.[30] The question remained, however, whether this standard of review applied as well to speech with no political, social or religious overtones. Not until the landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[31] did the Court address the issue in the context of purely commercial speech. In *Virginia Pharmacy* the Su-

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government. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1971). It has been suggested that Meiklejohn's zealous defense of the first amendment ignores commercial speech. *Id.* at 436.

[25] 421 U.S. 809 (1975).

[26] *Id.* at 822. Two years earlier, the Court had struck down two state criminal abortion statutes as violative of a woman's right to privacy protected by the due process clause of the fourteenth amendment. Doe v. Bolton, 410 U.S. 179, 180 (1973); Roe v. Wade, 410 U.S. 113, 154 (1973). *But cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (5-4 decision) (newspaper could not use sex-designated want ads in violation of city ordinance); United States v. Hunter, 459 F.2d 205, 211-12 (4th Cir. 1973) (classified advertisement in newspaper violated Title VIII by showing landlord's intent to discriminate against blacks).

[27] To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

421 U.S. at 826.

[28] *Id.* at 822.

[29] *Id.* at 821-22.

[30] See notes 24, 28 & 29 and accompanying text *supra.*

[31] 425 U.S. 748 (1976).

preme Court held that pharmacists[32] could not be prohibited from advertising prescription drug prices.[33] Granting first amendment protection to speech of a strictly commercial nature,[34] the Court applied what may be called a consumer interest test, the basic premise of which is that the consuming public is best protected when the channels of communication relaying commercial information are kept open.[35] Despite this expansion of first amendment protection,[36] the Supreme Court has maintained consistently that false, deceptive and misleading communications will receive only minimal protection from the judiciary.[37]

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[32] The suit was commenced by a consumers' group that asserted its right to receive the drug price data. *Id.* at 753. The pharmacists were not parties to the litigation. *Id.* at 783 (Rehnquist, J., dissenting).

[33] *Id.* at 769-70.

[34] The Court distinguished between the pharmacists' advertisements, which constituted pure commercial speech, and the *Bigelow* advertisement for abortion referral services, which clearly contained elements of political interest. *Id.* at 760-61.

[35] Scrutinizing the state's purpose for the regulations, the Court found "that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.* at 769. It stated further that "information is not in itself harmful, . . . people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770. In a later case, Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), the Court maintained that a community could not ban "For Sale" signs to prevent what was perceived as white flight. The effect of the prohibition was the concealing of important information from potential customers, and the Court concluded that the city's attempt to regulate the information available to the public was impermissible and unconstitutional. *Id.* at 91-98.

[36] The Court stated that "[t]here are commonsense differences between speech that is strictly commercial in nature and other types of expression." 425 U.S. at 771 n.24. Consequently, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Id.* at 771-72.

[37] *E.g.*, Bates v. State Bar, 433 U.S. 350, 383-84 (1977); *see* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 162 (7th Cir. 1977) (false claims that no correlation existed between eggs, cholesterol and incidence of heart disease were not shielded by first amendment); Banzhaf v. FCC, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968) (requirement that advertisers be permitted to present case against smoking is valid regulation of misleading speech); Feil v. FTC, 285 F.2d 879, 900-02 (9th Cir. 1960) (misleading advertisements about device to prevent enuresis not protected); E.F. Drew & Co. v. FTC, 235 F.2d 735, 739-40 (2d Cir. 1956) (misleading claim that oleomargarine is dairy product may be enjoined by FTC), *cert. denied,* 352 U.S. 969 (1957); Gelb v. FTC, 144 F.2d 580, 582 (2d Cir. 1944) (claim that cosmetic would permanently color hair was misleading); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (use of trade name "Rejuvenescence" for skin cream might deceive "the ignorant, the unthinking and the credulous"); United States v. Readers Digest Ass'n, Inc., 464 F. Supp. 1037, 1051 (D. Del. 1979) (use of "simulated checks" in sweepstakes program not protected by first amendment). For further discussion of first amendment rights and FTC regulation of advertising, *see generally* Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive*

In *Virginia Pharmacy,* the Court reserved judgment on the right of lawyers and physicians to advertise.[38] A year later, in *Bates v. State Bar,*[39] the Supreme Court held that advertisements for routine legal services were safeguarded by the first amendment.[40] While acknowledging the states' interest in maintaining the integrity of the legal profession,[41] the Court reiterated the consumer interest argument—that the concealing of information from consumers impedes reliable decision-making.[42] The Court rejected the contention that advertisements for legal services are inherently misleading, noting that while the extent and nature of legal services vary widely, the petitioners' advertisements publicized the availability of routine legal services only and made no

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or Unfair Advertising, 32 ARK. L. REV. 446 (1978); Knapp, *Commercial Speech, the Federal Trade Commission and the First Amendment,* 9 MEM. ST. U.L. REV. 1 (1978).

[38] 425 U.S. 748, 773 n.25. The Court indicated that fundamental differences exist between the standardized products sold by pharmacists and the "professional *services* of almost infinite variety and nature" offered by the legal and medical professions. *Id.* (emphasis added).

[39] 433 U.S. 350 (1977).

[40] *Id.* at 381-82.

[41] *Id.* at 365. Historically the courts have deferred to the states on the issue of what constitutes a reasonable regulation of professionals, reasoning that a substantial governmental interest—the protection of health, safety and welfare— is at stake. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (lawyers); Williamson v. Lee Optical, 348 U.S. 483, 489-90 (1955) (opticians); United States v. American Medical Ass'n, 110 F.2d 703, 714 (D.C. Cir. 1940) (physicians); New Jersey Chiropractic Ass'n v. State Bd. of Medical Examiners, 79 F. Supp. 327, 334-37 (D.C.N.J. 1948) (chiropractors); State Bd. of Optometry v. Orkin, 249 Miss. 430, 440, 162 So. 2d 883, 887 (1964) (optometrists).

Furthermore, prior to *Virginia Pharmacy* state regulations prohibiting advertisements by those engaged in the field of health care had been consistently upheld by the courts. *See* Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 427, 432 (1963) (New Mexico radio station and newspaper could be enjoined from carrying Texas optometrist's advertisements); Williamson v. Lee Optical, 348 U.S. 483, 489-90 (1955) (state legislature might have thought that ban on opticians' advertisements for eyeglass frames was rationally related to preserving good public health care for its citizens); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611-13 (1935) (appellant's announcement that he represented "painless dentistry" and "professional superiority" was misleading and subject to sanction); State Bd. of Optometry v. Orkin, 249 Miss. 430, 434, 162 So. 2d 883, 884 (1964) (board could prohibit optometrists' use of window displays); Dr. Bloom Dentist, Inc. v. Cruise, 259 N.Y. 358, 182 N.E. 16, 17 (1932) ("Prohibition against the use of flamboyant signs by members of a profession cannot be said to be unreasonable.").

In all of the above cases, the challenges to the respective restrictions were based on equal protection, due process or commerce clause grounds rather than first amendment rights. The justification most frequently adduced to support controls on professionals' advertising has been the states' interest in maintaining high standards of professionalism. "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." Williamson v. Lee Optical, 348 U.S. at 490.

[42] 433 U.S. at 376-77.

claims concerning the quality of the work.[43] The Court also noted that potential difficulties associated with the bar's enforcement of restrictions on advertising by lawyers were outweighed by the consuming public's right of access to important information.[44]

Although the *Bates* decision did not address the issue of personal solicitation by attorneys, two subsequent cases, *Ohralik v. Ohio State Bar Association*[45] and *In re Primus*,[46] offer some guidance on the permissible limits of this mixture of speech and conduct. In *Ohralik* the Court held that a lawyer's visiting prospective clients and offering to represent them on a contingency basis circumvents accepted standards of professional conduct under *Bates*.[47] In *Primus*, however, the Court ruled that a lawyer's cooperation with the ACLU in attempts to represent a woman who had been sterilized as a prerequisite to receiving public medical assistance was a form of political expression protected by the first amendment.[48] Thus, while the Court adhered assiduously to the distinction between commercial and political speech in the context of first amendment protection,[49] its decisions in *Bates* and *Virginia Pharmacy* seemed to signal an erosion of the Court's traditional deference to the states' right to regulate certain professions,[50] and a new respect for the

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[43] *Id.* at 372-75. An important consideration in scrutinizing regulations of commercial speech is whether alternative methods of communication are available. In *Bates*, for example, the Court cited several surveys indicating that many consumers refrain from seeking legal aid because there is a dearth of information about how to select a competent lawyer. *Id.* at 371 n.23, 374 n.30. The Court generally examines the challenged regulation with an eye toward the reasonableness of the alternative methods of communicating the data. *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[44] 433 U.S. at 379.

[45] 436 U.S. 447 (1978).

[46] 436 U.S. 412 (1978).

[47] 436 U.S. at 460-62. The two young women who retained Ohralik had been involved in an automobile accident. Ohralik visited one client while she was in traction in a hospital; his other client was at her home when he arrived uninvited and offered to represent her. Ohralik secretly recorded both conversations. When the reluctant clients tried to discharge him, he insisted that they were bound by their earlier decision. *Id.* at 449-52.

[48] 436 U.S. at 422-32, (citing NAACP v. Button, 371 U.S. 415, 428-29 (1963) (solicitation of business by NAACP was mode of political expression and exercise of associational rights)). *See generally* Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585 (1978).

[49] Purely commercial speech, because it is more easily verifiable than other forms and is less likely to be chilled by regulation, is subject to a different degree of protection than political speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[50] See notes 41 & 42 and accompanying text *supra*.

constitutional status of commercial speech.

In the instant case, the Court reasoned that since the individual states have a substantial interest in providing the best possible health care for their citizens[51] and since trade names may be inherently misleading to consumers,[52] states may, to protect the public from deceptive practices, proscribe the use of trade names in optometrists' advertising.[53] Furthermore, the Court noted that since the trade name, Texas State Optical, had no secondary meaning, not having acquired a reputation sufficient to connote to consumers a particular quality of service or price,[54] and since optometrists could legally advertise prices,[55] the limitation on optometrists' first amendment rights was minimal at most.

In a separate opinion, Justice Blackmun[56] asserted that since the ban had been imposed ostensibly to prevent optometrists from concealing their identities and since it applied regardless of whether optometrists made their names a matter of public notice, the justification for the prohibition was undermined by the statute's overly inclusive language.[57] He stated further that since commercial optometry was not illegal in Texas and since consumers had an interest in knowing about the services at their disposal, the state could not forbid this commercial conduct unless the prohibition served a substantial governmental interest.[58] Justice Blackmun maintained that since the state's desire to discourage the practice of commercial optometry was not a substantial governmental interest, the state could not restrict commercial speech to effect that end.[59]

The instant case marks a reversal of the Court's recent trend toward providing greater protection for commercial speech. The decisions after *New York Times*[60] involving commercial speech appeared to be successive stages in the evolution of a new standard of review for that form of expression. That communication of matters of public interest would receive a level of review comparable to that afforded political or religious speech was made clear by the holding in *Bigelow*.[61] The Court acknowledged in *Virginia Pharmacy* that in a fast-paced society the consumer's

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[51] Friedman v. Rogers, 99 S. Ct. 887, 897 (1979).

[52] *Id.* at 896-97.

[53] *Id.* at 897.

[54] *Id.*

[55] *Id.* See note 4 *supra*.

[56] 99 S. Ct. at 901 (Blackmun, J., concurring in part and dissenting in part). Justice Marshall joined in Justice Blackmun's opinion. *Id.*

[57] 99 S. Ct. at 901-02.

[58] *Id.* at 902.

[59] *Id.* at 902-03.

[60] See notes 21 through 24 and accompanying text *supra*.

[61] See notes 28 & 29 and accompanying text *supra*.

interest in the prices of various commodities is equally as strong as his interest in political debate.[62] In *Bates* the Court recognized the right of the public to receive and of lawyers to dispense truthful information concerning routine legal services.[63] The significance of that decision lies in the triumph of the first amendment rights of consumers and suppliers over the state's right to regulate its professions, a prerogative long deferred to by the courts.

A major problem with the *Friedman* opinion is the Court's failure to support its assertion that the trade name in question was inherently misleading. As Justice Blackmun pointed out, words that have no intrinsic meaning cannot by themselves be deceptive.[64] Manipulation of commercial information and unscrupulous business practices rather than the use of trade names per se are the sources of commercial deception.[65] Nevertheless, the majority in *Friedman* ignored the logical distinction between that which is susceptible to abuse and that which is inherently abusive, concluding erroneously that because trade names could be misleading they are intrinsically deceptive. In *Bates,* the Court recognized the potential for deception in advertising by lawyers, but left the problems of regulation in the hands of local bar organizations.[66] No suggestion was made in *Friedman* that optometrists who use trade names could be similarly governed by the Texas Optometry Board. Indeed, trade names connoting certain standards of price and quality of routine eye examinations[67] are in no substantial way different from advertisements connoting similar standards with respect to routine legal services.

Another problem left in the wake of *Friedman* concerns the level of review applicable to commercial speech. Recent decisions had made clear that commercial speech containing a message of public interest would be granted a high degree of first amendment protection.[68] The same cases indicated that consumers had a first amendment right to receive such information.[69] With its adoption of a consumer interest test, the Court appeared to prefer more disclosure through advertising over

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[62] See notes 31 through 37 and accompanying text *supra.*

[63] See notes 41 & 42 and accompanying text *supra.*

[64] 99 S. Ct. at 901 (Blackmun, J., concurring in part and dissenting in part).

[65] *Id.*

[66] See notes 46 & 47 and accompanying text *supra.*

[67] The lower court found "that the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services." Rogers v. Friedman, 438 F. Supp. 428, 431 (E.D. Tex. 1977), *aff'd in part and rev'd in part,* 99 S. Ct. 887 (1979).

[68] See notes 28 & 29 and accompanying text *supra.*

[69] See notes 24, 30 & 35 and accompanying text *supra.*

the impeding of the flow of commercial data.[70] Consequently, the Court opened the channels of communication and allowed consumers more freedom in making their own decisions.

Friedman reverses this progressive trend. First, the Court summarily disposed of the Texas Senior Citizens Association's assertion of a first amendment right to receive commercial information.[71] More importantly, however, the Court stated that commercial speech could still be regulated when state interests so required.[72] Implicit in this statement is an atavistic manifestation of the balancing test used in previous cases to determine the constitutionality of restrictions on speech.[73] By that test, a substantial governmental interest in regulating speech is deemed sufficient to justify infringements on first amendment rights,[74] although a low level of scrutiny is applied to the question of what constitutes a substantial governmental interest. This approach clearly contradicts that taken by the Court in *Bates* and *Virginia Pharmacy*.

Though the Court in *Friedman* held that optometrists may not use trade names in advertisements, it did not indicate what its decision portends for pure commercial speech that is not affected by substantial governmental interests. Despite an apparent reversal of the trend toward protecting commercial speech, it must be remembered that *Friedman* does not preclude totally the use of appropriate advertising techniques by those engaged in the practice of optometry. The case simply illustrates that commercial speech still occupies a precarious position on the scale of first amendment rights.

Sally R. Guider

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[70] See note 37 and accompanying text *supra*.

[71] 99 S. Ct. at 892-93. Indeed, the Court never really addressed the contentions of the Texas Senior Citizens Association.

[72] In a significant footnote, Justice Powell wrote:

> Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests . . . . When dealing with restrictions on commercial speech we frame our decisions narrowly, "allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression."

Id. at 894 n.9 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[73] See note 12 and accompanying text *supra*.

[74] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (four-part balancing test). *See* note 12 and accompanying text *supra*.

LABOR LAW—FEDERAL PREEMPTION—NATIONAL LABOR POLICY DOES NOT PREEMPT STATES FROM PAYING UNEMPLOYMENT INSURANCE TO STRIKERS

In an action brought against the New York Department of Labor, petitioners[1] sought a declaration that a state statute authorizing payment of unemployment compensation to striking employees[2] was invalid, an injunction against further enforcement of the statute, and an award recouping increased taxes petitioners had paid as a result of the disbursement of those benefits.[3] Benefits had been paid under authority of the statute to employees of the Bell Telephone System who had staged a nationwide strike in 1971.[4] The dispute was resolved quickly in accordance with an agreed upon bargaining format, but New York Bell employees refused to accept the settlement[5] and continued striking for seven months. During that time, most New York Bell employees col-

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[1] Petitioners were four New York units of the Bell Telephone Company: New York Telephone Company, Western Electric Company, American Telephone and Telegraph Company Long Lines Department, and Empire City Subway Company. New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 1332 n.1 (1979).

[2] N.Y. LAB. LAW § 592.1 (McKinney 1977) provides that "[t]he accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed." This seven-week period is in addition to the one week required if unemployment was not due to an industrial controversy. *Id.* § 590.7 (McKinney Supp. 1978). Rhode Island is the only other state that provides unemployment benefits to strikers. See note 48 *infra.*

[3] New York's unemployment insurance scheme is financed by a pooled fund consisting of a "general account" and numerous "employer accounts." N.Y. LAB. LAW §§ 577, 581.1(d) (McKinney 1977). The general account is funded by federal contributions made pursuant to Title IX of the Social Security Act. 42 U.S.C. § 1103 (1976). Employer accounts are based upon each qualifying employer's experience ratings, which are computed according to the actual unemployment benefits paid to the former workers of each employer. That sum is debited to the appropriate employer's account and the employer's taxes are tallied according to the depletion of his account. N.Y. LAB. LAW § 581.1(e). It is this depletion for which petitioners sought recoupment. See note 6 *infra.* Most states use experience ratings to compute the employer contributions necessary to finance unemployment benefits. Larson & Murray, *The Development of Unemployment Insurance in the United States,* 8 VAND. L. REV. 181, 205 (1955). *See generally* Teple & Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications,* 8 VAND. L. REV. 376, 389-408 (1955) (synopsis of various experience rating formulas).

[4] Seventy percent of the Bell Telephone Company's nonmanagement employees are members of the Communication Workers of America, AFL-CIO (CWA). New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 1332 (1979).

[5] Under the established collective bargaining format, CWA officials and management selected two Bell affiliates to be "pattern-setters"; that is, the settlement reached by those locals was to be the standard for all similar issues arising in Bell units across the country. By refusing to ratify the settlement involved here, the New York strikers were attempting to break away from this bargaining format. *Id.* at 1332 n.1.

lected unemployment insurance.[6] The district court[7] accepted petitioners' contention that the payment of unemployment compensation to strikers conflicted with national labor policy[8] and that the New York law was invalid under the supremacy clause.[9] The Court of Appeals for the Second Circuit reversed, accepting respondent's contention that the conflict was one Congress had intended to tolerate.[10] On writ of certiorari to the United States Supreme Court, *held,* affirmed. A state statute that authorizes the payment of unemployment compensation benefits to striking employees out of a state fund to which the employer must contribute is not preempted by either national labor policy or the National Labor Relations Act. *New York Telephone Co. v. New York State Department of Labor,* 99 S. Ct. 1328 (1979).

The doctrine of preemption is concerned with the drawing of boundaries between federal and state authority. The boundaries are drawn by the Supreme Court, guided by federal legislation and the Constitution.[11]

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[6] During the seven-month strike by petitioners' 38,000 employees, $43,000,000 in unemployment benefits was disbursed to 33,000 employees, $40,000,000 of which was charged against petitioners' employer account. *Id.* at 1332, 1349 n.6.

[7] New York Tel. Co. v. New York State Dep't of Labor, 434 F. Supp. 810, 820-24 (S.D.N.Y.), *rev'd,* 566 F.2d 388 (2d Cir. 1977), *aff'd,* 99 S. Ct. 1328 (1979).

[8] The policy of free collective bargaining is expressed in the National Labor Relations Act (NLRA) § 1, 29 U.S.C. § 151 (1976), and in the Labor Management Relations Act (LMRA) § 1(b), 29 U.S.C. § 141 (1976). *See generally* Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337, 1352-53 (1972) (inquiry into what constitutes national labor policy).

[9] U.S. CONST. art. VI, cl. 2.

[10] 566 F.2d 388, 395 (2d Cir. 1977), *aff'd,* 99 S. Ct. 1328 (1979). *See generally* Note, *Labor Preemption: Striking Workers' Right to Collect Unemployment Benefits,* 4 U. DAY. L. REV. 239, 244-55 (1979) (review of court of appeals' opinion and approaches the Supreme Court could have taken in the instant case).

[11] The Supreme Court's approach to the preemption problem has not been so uniform as to lend itself to categorization. But "strains of doctrinal consistency" have surfaced. Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623, 623-24 (1975). One situation in which preemption arises is where the federal interest is so dominant that it precludes any state interference. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851); *see* Pennsylvania v. Nelson, 350 U.S. 497, 504-05 (1956) (state cannot punish seditious acts directed against federal government); Hines v. Davidowitz, 312 U.S. 52, 73-74 (1941) (federal alien registration act precludes concurrent state registration laws). Another preemption setting occurs when Congress enacts legislation pursuant to the commerce clause and in conjunction with the supremacy clause. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 177-78 (1977) (portion of state regulation concerning oil tankers preempted by federal law); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973) (local air curfews preempted by FAA and EPA regulations); Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 63 (1954) (state provisions for license suspension preempted by Federal Motor Carrier Act); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 541-42 (1945) (conflict between state statute and NLRA); Southern Pac. Co. v. Jensen, 244 U.S. 205, 210 (1917) (portions of maritime law require national uniformity). Finally, preemption may arise when state action conflicts

The doctrine of labor law preemption[12] did not develop until after the enactment of the National Labor Relations Act (NLRA) and the Labor-Management Relations Act (LMRA).[13] Although these Acts terminated exclusive state regulation of labor, Congress failed to specify in the Acts the extent of the asserted federal powers. Thus, the principle of labor law preemption has evolved from the Supreme Court's efforts to define, without congressional guidance, the scope of state and federal authority.[14]

Few labor preemption cases have involved activities outside the scopes of sections 7 and 8.[15] The first major labor preemption case,

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with federal legislation enacted pursuant to the supremacy clause. *See* Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 429-31 (1963) (state regulation of professional advertising does not conflict with federal law); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444-48 (1960) (no overlap between federal ship-inspection laws and municipal ordinance); *cf.* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (no preemption since compliance with both federal and state regulations was possible). *See generally* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 219-24 (1959) (analysis of different categories of preemption decisions).

[12] The current Supreme Court has defined labor law preemption as "the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.'" New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 1334 (1979) (quoting Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 187 (1978)).

[13] The regulation of labor was originally left to the states. In 1935, however, Congress enacted the NLRA (Wagner Act), Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-197 (1976)). In 1947, Congress revised the NLRA by enacting the LMRA (Taft-Hartley Act), Pub. L. No. 80-101, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-44, 151-66, 171-87 (1976)). Both Acts articulated national labor policy and were enacted pursuant to congressional power under the commerce clause. U.S. CONST. art. 1, § 8. The NLRA was deemed constitutional in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-31 (1937). Through the NLRA, Congress exercises the full extent of its constitutional powers. *See* NLRB v. Fainblatt, 306 U.S. 601, 606-07 (1939). For a discussion of the historical background and congressional goals involved in the enactment of the NLRA and LMRA, see H. WELLINGTON, LABOR AND THE LEGAL PROCESS 26-46 (1968).

The purpose of national labor legislation was announced in the "Short Title" to the LMRA. 29 U.S.C. § 141 (1976). An examination of the Senate Report on the Act reveals that the Act does not provide for private remedies but encompasses only public matters affecting commerce. S. REP. No. 628, 74th Cong., 1st Sess. 8 (1935). For an analysis of congressional intent and the NLRA, see Rose, *The Labor Management Relations Act and the State's Power to Grant Relief*, 39 VA. L. REV. 765, 765-67 (1953).

[14] Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971). The Court more recently held "[t]he doctrine [of labor law preemption] is to a great extent the result of [this] Court's on-going effort to decipher the presumed intent of Congress in the face of that body's steadfast silence." Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188 n.12 (1978).

[15] *See* Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 470-82 (1955) (section 7 preempts state trade restraint statute as applied to peaceful picketing); UAW v. O'Brien, 339 U.S.

Garner v. Teamsters Local 776,[16] was not decided until 1953. In that decision, the Supreme Court defined the scope of labor preemption by prohibiting direct state duplication of two NLRA provisions:[17] protected labor activities under section 7[18] and prohibited labor practices under section 8.[19] The *Garner* rule was refined to its current form in the landmark decision in *San Diego Building Trades Council v. Garmon*.[20] According to the analysis in *Garmon*, preemption occurs when the activity the state has sought to regulate is arguably protected by either section 7 or section 8. The *Garmon* Court also noted that only the National Labor Relations Board (NLRB) may determine whether the conduct is embraced by one of these sections.[21]

454, 457 (1950) (section 7 preempts state statute requiring registration and compulsory mediation before strike); Plankinton Packing Co. v. Wisconsin Bd., 338 U.S. 953, 953 (1950)(per curiam) (section 8 preempts state injunctive power against actions state deems illegal); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 541-44 (1945) (section 7 preempts state registration requirements for "business agents").

[16] 346 U.S. 485 (1953).

[17] *Id.* at 491-98 (state court injunction of peaceful labor picketing preempted); *cf.* Building Trades Council v. Kinard Constr. Co., 346 U.S. 933, 933 (1954) (common law actions against peaceful labor disputes preempted).

[18] This section guarantees employees certain "protected" rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157 (1976).

[19] Under this section, it is "an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [known as section 7] of this title; [or] (2) to dominate or interfere with the formation or administration of any labor organization." 29 U.S.C. § 158 (1976).

[20] 359 U.S. 236 (1959).

[21] *Id.* at 244-45.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield . . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .

Id. This rationale has been criticized from within the Court, *see* Taggart v. Weinacker's, Inc., 397 U.S. 223, 228 (1970) (Burger, C.J., concurring); International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202 (1970) (White, J., concurring), as well as by scholars. *See* Lesnik, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 472-81. The *Garmon* principle is not a constitutional rule. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963). Nevertheless, it has recently been reaffirmed in strong terms. Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274, 284-301 (1971) (history of labor law preemption, emphasizing *Garmon's* importance).

Garmon is a prime example of the Court's propensity to apply the labor preemption doctrine readily. It is an "expansive concept of preemption. . . . Specifically it set to rest the contention that state law could supplement federal remedies." Lesnik, *supra*, at 470.

The *Garmon* rule, also known as the primary jurisdiction rationale,[22] has two exceptions that prohibit preemption when state power is exercised over an activity that falls within either exception.[23] The first exception involves activities that concern the NLRA only peripherally.[24] The second includes activities that touch a state interest which is so deeply rooted in traditional local concern that, in the absence of a compelling legislative directive to the contrary, courts will not infer a congressional intent to preempt.[25]

The first Supreme Court decision to examine labor preemption outside the narrow context of sections 7 and 8 was *Local 20, Teamsters v. Morton.*[26] In that case, employees were exerting secondary boycott pressures on their employer.[27] Although their conduct was violative of state law, it did not constitute an unfair labor practice under the NLRA.[28] Reasoning that these activities constitute one form of the economic weapon of self-help,[29] the Court held that such tactics are part of the

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[22] Commentators have used the term "primary jurisdiction rationale" for years. *E.g.*, Cox, *supra* note 8, at 1351; Lesnik, *supra* note 21, at 470. The Supreme Court, however, has only recently adopted the term. Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 200 (1978).

[23] 359 U.S. at 243-44.

[24] *Id.* The most cited example of the peripheral activity exception is International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-23 (1958) (state court can award damages for breach of employment contract, even though this activity is covered by the NLRA).

A peripheral activity has been defined as one that "in certain aspects may involve an unfair labor practice but primarily involves violations of state law for which the NLRA provides no remedy." Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity,* 83 HARV. L. REV. 552, 558 (1970). This language bears close resemblance to Professor Cox's proposed test for preemption cases. State laws of "general applicability," as opposed to those aimed particularly at union activities, are not preempted. Cox, *supra* note 8, at 1356-59.

[25] 359 U.S. at 244. Violence is the activity that most readily falls within the second exception to the *Garmon* rule. *E.g.*, Youngdahl v. Rainfair, 355 U.S. 131, 138-40 (1957) (state is not preempted from regulating strikers who threaten violence). There are also instances of permissible state regulations in cases not involving violence. *See* United Constr. Workers v. Laburnun Constr. Corp., 347 U.S. 656, 657 (1954) (recovery in tort for damages because of threatening violence not preempted); *cf.* Linn v. United Plant Guard Workers, 383 U.S. 53, 61 (1966) (tort action for intentional false statements made against plaintiff not preempted). The second *Garmon* exception was recently reaffirmed in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 136 (1976).

[26] 377 U.S. 252 (1964). For an analysis of the *Morton* rule, see Cox, *supra* note 8, at 1351-59.

[27] 377 U.S. at 255.

[28] *Id.* at 259; *see* NLRB v. Servette, Inc., 377 U.S. 46, 50-55 (1964) (secondary boycott is an economic weapon not prohibited by section 8).

[29] 377 U.S. at 259.

balance that Congress established between labor and management.[30] If that balance is to remain intact, a state may neither regulate such tactics nor treat either labor or management with partiality.[31] While the necessity of state neutrality in labor disputes was recognized before *Morton*,[32] it was not until after that decision that new emphasis on neutrality emerged.[33] *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*[34] involved a cease and desist order entered in the absence of NLRA violation by a state labor relations board against employees' concerted refusals to work overtime.[35] Relying upon *Morton*, the *Lodge* Court held that neither the state nor the NLRB has the power to regulate the economic weapon of self-help since Congress intended its regulation to be only by the free play of economic forces.[36] The crucial point of inquiry, however, is in whether the state's regulation of conduct would frustrate the effective implementation of national labor policy.[37] Since the conduct in *Lodge* constituted

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[30] Congress established a balance of power "between the conflicting interests of the union, the employees, the employer and the community." *Id.* at 259. Conduct that Congress left unregulated constitutes a "weapon of self-help," and that weapon forms an "integral part" of a union's "effort to achieve its bargaining goals during negotiations" with an employer. *Id.* Allowing state interference with the use of economic weapons would serve "to frustrate the congressional determination to leave [the] weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 259-60.

[31] *Id.* at 259-60.

[32] The necessity of neutrality was recognized as early as 1953 in Garner v. Teamsters Local 776, 346 U.S. 485 (1953). In that case, the Court recognized that "[f]or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act [NLRA] prohibits." *Id.* A few cases after *Garner* have indirectly mentioned neutrality. *See* Retail Clerks, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) (congressional purpose is the touchstone); NLRB v. Insurance Agents, 361 U.S. 477, 488-89 (1960) (economic weapons left to the parties are part and parcel of the NLRA); NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957) (NLRA does not deny availability and use of self-help of employers).

[33] *See* NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (federal labor scheme protects some activities, prohibits some practices privileged against state regulation, and leaves others to be controlled by the free play of economic forces); Hanna Mining Co. v. Marine Eng'rs, 382 U.S. 181, 187 (1965) (the legislature has deemed certain activities to be privileged although they are neither protected nor prohibited by the NLRA); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317-18 (1964) (economic weapons left to labor and management cannot be denied to one party just because the NLRB finds that one party's bargaining strength is too great); *cf.* Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1976) (to curb court regulation of activities that Congress purposely left unregulated, federal courts no longer have jurisdiction to grant injunctions against peaceful labor disputes).

[34] 427 U.S. 132 (1976).

[35] *Id.* at 133-36.

[36] *Id.* at 149-50. *See generally* cases cited in notes 32 & 33 *supra.*

[37] 427 U.S. at 147-48, (citing Railroad Trainmen v. Jacksonville Terminal Co., 394

an economic weapon, and since state regulation would frustrate national labor policy, preemption was applied.[38] The *Lodge* decision strengthens the *Morton* rationale and illustrates the most recent thrust of the Court's analysis of labor law preemption in the area of state regulation of activities that are neither protected by section 7 nor prohibited by section 8.

The Supreme Court has never ruled on whether public benefits paid to strikers are preempted by national labor policy.[39] Lower courts, however, have treated this issue. The Court of Appeals for the First Circuit examined welfare benefits paid to strikers in *ITT, Lamp Division v. Minter.*[40] The court concluded that the second exception to the *Garmon* principle[41] was applicable since the state interest at issue in *Minter* was so deeply rooted in local concern that, in the absence of a compelling congressional directive, preemptive intent would not be implied.[42] Although the court noted that Congress was the more appropriate form for the contesting of this issue,[43] it ruled that a catalogue of data could show to a degree sufficient to warrant judicial action that the payment of welfare benefits to strikers substantially disturbs free collective bargaining.[44]

U.S. 369, 380 (1969)).

[38] 427 U.S. at 146-48.

[39] In 1974, the Court decided Super Tire Eng'ring Co. v. McCorkle, 416 U.S. 115 (1974). *Super Tire* involved welfare assistance for strikers, but the merits of the case were not reached. The Court did, however, remark in the opinion:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey prevades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes.

Id. at 124. The Court also dismissed, for want of a substantial federal question, the appeal of a case involving public assistance payments made to strikers. Kimbell, Inc. v. Employment Security Comm'n, 429 U.S. 804 (1976). See note 57 *infra.*

[40] 435 F.2d 989 (1st Cir.), *cert. denied,* 402 U.S. 933 (1970). For a full discussion of the *Minter* decision and an overview of welfare payments to strikers, see Comment, *Welfare for Strikers: ITT v. Minter,* 39 U. Chi. L. Rev. 79, 79-106 (1971).

[41] *See* San Diego Bldg. Trades v. Garmon, 359 U.S. 236, 244 (1959). See note 25 and accompanying text *supra.*

[42] 435 F.2d at 992-93. The court went on to devise a complicated formula for determining the applicability of preemption in cases in which there is no direct conflict with explicit federal legislation: the federal interest in free collective bargaining is balanced against the state's interest to arrive at a quantum of impact which, in turn, reveals the extent of the infringement upon national labor policy. *Id.* at 992-94.

[43] *Id.* at 993-94; *accord,* Grinnell Corp. v. Hackett, 475 F.2d 449, 453-54 (1st Cir.) (although Congress is the preferable forum, the questions are not beyond the realm of the courts), *cert. denied,* 414 U.S. 858 (1973).

[44] 435 F.2d at 993-94. For a compilation of data concerning the effect of public assis-

In *Grinnell Corp. v. Hackett*[45] the First Circuit considered an issue similar to that in *Minter*. *Grinnell* involved Rhode Island's unemployment compensation scheme, which was enacted pursuant to Title IX of the Social Security Act.[46] The federal scheme allowed states great discretion regarding the format of the plan they could adopt,[47] and Rhode Island's statute authorized the payment of benefits to strikers.[48] Remanding the case for a determination of whether financial aid to strikers had been preempted by national labor statute and policy,[49] the First

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tance benefits upon collective bargaining, see A. THIEBLOT AND R. COWIN, WELFARE AND STRIKES: THE USE OF PUBLIC FUNDS TO SUPPORT STRIKERS (1972).

[45] 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973). Although the district court considered itself bound by the remark in *Minter* that Congress is the preferable forum, 344 F. Supp. at 754, the First Circuit dealt with the substantive issues.

[46] 26 U.S.C. § 3301-3311, 42 U.S.C. § 501-1320b-1. To induce state action, the Social Security Act imposes a payroll tax (Federal Unemployment Tax) against which employers may offset up to 90% of their contributions to state unemployment compensation funds provided the state's scheme meets certain minimum standards. *See* Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 187-89 (1955). For an excellent overview of unemployment insurance systems and some statistical comparisons, see A. THIEBLOT AND R. COWIN, *supra*, note 44, at 256-63.

[47] S. REP. No. 628, 74th Cong., 1st Sess. 13 (1935). The Senate Committee reported that "[u]nder the bill . . . the States will . . . have freedom of choice with regard to the type of unemployment compensation law they wish to enact." *Id.* The Social Security "Draft Bill," however, was adopted by the majorty of the states. *Id.* Mississippi falls within this category. According to the Mississippi statute, an individual is disqualified for benefits if the Unemployment Commission finds:

> that his total unemployment is due to a stoppage of work which exists because of a labor dispute . . . provided, that this subsection shall not apply if it is shown to the satisfaction of the commission:
>
> (a) He is unemployed due to a stoppage of work occasioned by an unjustified lockout . . . or
>
> (b) He is not participating . . . in the labor dispute which caused the stoppage of work . . . .

MISS. CODE ANN. § 71-5-513 (Supp. 1979). For a comparison of the various state statutes, see A. THIEBLOT AND R. COWIN, *supra* note 44, at 258-61; Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294 (1950). In most states, strikers are ineligible for employment compensation, but the mechanics of labor dispute disqualifications is a field unto itself. *See generally* Williams, *The Labor Dispute Disqualifications: A Primer and Some Problems*, 8 VAND. L. REV. 338, 338-75 (1955) (general discussion of disqualifications and a particular treatment of some related problems). New York's unemployment insurance statute differs from most state schemes by specifically authorizing payment to striking employees after a waiting period of eight weeks. See notes 2 & 3 *supra*.

[48] The Rhode Island statutory scheme, R.I. GEN. LAWS. §§ 28-44-1, -14, -16 (1968), and the New York unemployment compensation scheme are the only state plans that expressly authorize that payment of benefits to all strikers, with benefits accumulating after a specified waiting period.

[49] 475 F.2d at 453.

Circuit, formulating a new test,[50] reasoned that in the absence of an unambiguous preemptive intent discernible from congressional history,[51] the court must consider whether the state activity palpably infringes upon national labor policy.[52] If there is an infringement, the state interest[53] involved must be surveyed to determine whether it is closely balanced with the federal interest.[54] If so, there is no preemption of state law.[55] Most importantly, however, the *Grinnell* decision placed emphasis on the fact that Congress was aware of the issue involved but refrained from exercising the opportunity to legislate on it.[56]

Two years after *Grinnell* the Supreme Court dismissed for want of a substantial federal question a case concerning the preemption of public assistance paid to strikers.[57] Moreover, there have been only scat-

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[50] *See* note 42 *supra*.

[51] 475 F.2d at 457. The court suggested that congressional intent might be articulated in analogous programs. *Id.* Legislation considered analogous to unemployment insurance includes the Railroad Unemployment Insurance Act, 45 U.S.C. § 354(a-2)(iii) (1976), and the Food Stamp Act of 1964, 7 U.S.C. § 2014(c) (1976). These programs permit benefit payments to strikers, the latter expressly providing for benefits to strikers. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d at 388, 395 (2d. Cir. 1977). Finally, whether AFDC-UF benefits may be paid to the children of strikers is left to the discretion of the state. Batterton v. Francis, 432 U.S. 416, 429 (1977).

[52] 475 F.2d at 457 (citing Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945)). Evidence should be marshalled to show an effect on the collective bargaining process. 475 F.2d at 461. See note 44 and accompanying text *supra*.

[53] A possible compelling state interest might be the "minimization of violence in labor disputes . . . and avoidance of economic stagnation in local communities." 475 F.2d 461. But the state interest in unemployment compensation is not identical with the state interest in welfare payments. Welfare payments are "premised on a finding of need, are directed at alleviating real hardship—serious threats to the physical well-being." *Id.* at 459; *cf.* NLRB v. Gullett, 340 U.S. 361, 364-65 (1951)(unemployment benefits do not constitute direct compensation by employers to strikers because the funds disbursed are public); *In re* Cassaretakis, 289 N.Y. 119, 44 N.E.2d 391, 394-95 (1942) (unemployment benefits paid to strikers are not direct compensation by employer), *aff'd sub nom.* Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943).

[54] 475 F.2d at 457. Analyzing congressional intent, the court concluded that Congress was aware of the possible infringement of New York's unemployment insurance system upon national labor policy. *Id.* at 454-57. The *Grinnell* formula includes the weighing of inaction "should the evidence on infringement and state interest be closely balanced." *Id.* at 454.

[55] *Id. See generally* 8 SUFFOLK L. REV. 235, 235-44 (1974) (review of *Grinnell* opinion and its background).

[56] 475 F.2d at 454-57. See note 54 *supra* and note 64 and accompanying text *infra*.

[57] Kimbell, Inc. v. Employment Security Comm'n, 429 U.S. 804 (1976). Most courts that have considered the question have held that *Kimbell* is not dispositive of the preemption issue. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 389, 391 n.2 (2d Cir. 1977); Dow Chem. Co. v. Taylor, 428 F. Supp. 86, 90 (E.D. Mich. 1977); Hawaiian Tel. Co. v. Hawaii Dep't of Labor, 405 F. Supp. 275, 286 (D. Hawaii 1976). *Contra,* Super Tire Eng'ring Co. v. McCorkle, 550 F.2d 903, 904-05 (3d Cir. 1977).

tered lower court opinions examining this issue[58] since *Minter* and *Grinnell*. Of those opinions, none has added new perspectives because they generally dwell upon the ascertaining of congressional intent.[59]

A recent Supreme Court decision, *Ohio Bureau of Employment Services v. Hodory*,[60] considered congressional intent concerning the payment of unemployment benefits and national labor policy. In that case, a state unemployment insurance statute disqualified any applicant who had lost his job because of a labor dispute.[61] Plaintiff was not a striker himself, but his place of employment was temporarily closed because of of other strikes against his employer.[62] The Court's study of congressional history showed that when Congress had in the past imposed restrictions upon compensation schemes it had done so in explicit terms.[63] The Court therefore concluded that congressional silence on this issue indicated an unambiguous intent to allow the states freedom to choose their own compensation systems.[64] The Court held that the statutory provisions disqualifying Hodory from receiving unemployment benefits did not conflict with provisions of the Social Security Act.[65]

In the instant case, the plurality[66] reasoned that since New York's statute does not regulate private conduct,[67] is generally applicable to the

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[58] Olin Corp. v. Illinois Dep't of Labor, 443 F. Supp. 366, 368-70 (S.D. Ill. 1978) (relying upon New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388 (2d Cir. 1977) (state unemployment benefit scheme was not preempted)); Dow Chem. Co. v. Taylor, 428 F. Supp. 86, 89-91 (E.D. Mich. 1977) (unemployment benefit scheme providing for payment to strikers not necessarily preempted); Hawaiian Tel. Co. v. Hawaii Dep't of Labor, 405 F. Supp. 275, 283-91 (D. Hawaii 1976) (synopsis of labor preemption precedent and congressional intent, the court concluding that unemployment benefit scheme was preempted).

[59] Note, *supra* note 10, at 244-47.

[60] 431 U.S. 471 (1977).

[61] *Id.* at 472-73.

[62] *Id.* at 473.

[63] *Id.* at 488.

[64] "The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security nor the Federal Unemployment Tax Act was intended to restrict the State's freedom to legislate in this area." *Id.* at 488-89. See note 47 and accompanying text *supra*. In Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1977) the First Circuit concluded that congressional intent in this area was ambiguous. *Id.* at 454. Nevertheless, intent played an important role in the *Grinnell* formula. See note 54 *supra*.

[65] 431 U.S. at 488.

[66] The plurality opinion was delivered by Justice Stevens, and was joined by Justices White and Rehnquist. See text accompanying notes 67 through 71 *infra*. Justices Blackmun and Marshall concurred, see note 71 *infra*, as did Justice Brennan in a separate opinion. See note 68 *infra*. Justice Powell was joined in his lengthy dissent by Chief Justice Burger and Justice Stewart. See notes 73 & 74 and accompanying text *infra*.

[67] 99 S. Ct. at 1337-38.

public and is not aimed solely at regulating the labor-management relationship,[68] the *Morton* and *Lodge* inquiry regarding frustration of the effective implementation of the national labor policy was not the applicable test.[69] Furthermore, since Congress has been sensitive to the importance of the states' interest in fashioning their own unemployment compensation schemes,[70] the New York statute should be treated with the same deference given analogous state laws that involve interests deeply rooted in local concern.[71] The plurality concluded that since un-

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[68] In a concurring opinion, Justice Brennan reasoned that since he was not satisfied with the distinctions drawn by the plurality between the instant case and *Morton,* he would apply the *Morton* analysis to determine whether the state action interfered with effective implementation of national labor policy. 99 S. Ct. at 1344. Justice Brennan found the plurality's distinction between statutes that regulate public and those that regulate private conduct insufficient to "justify different levels of scrutiny." *Id.* It may seem that Justice Brennan was referring to the low scrutiny review found in Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955), and the high scrutiny review exemplified in Shapiro v. Thompson, 394 U.S. 618, 627 (1969). It seems plausible that his point of contention was actually that the plurality's reasoning did not justify the use of another rationale. Justice Brennan stated that the plurality's second distinction between the instant case and *Morton,* that between laws of general applicability and those directed solely at labor-management relations, may be "more significant than the *Lodge* rule." 99 S. Ct. at 1344. Justice Brennan would not embrace that distinction here, however, because he was not convinced that the New York law was in fact one of general applicability and because there was no practical reason to adopt unstable distinctions when the traditional *Morton* approach would yield the same result. *Id.*

[69] 99 S. Ct. at 1335-37. See notes 37 & 38 and accompanying text *supra.* Only the plurality, Justices Stevens, White and Rehnquist found the *Morton* and *Lodge* rule to be inapplicable. The concurring Justices, Brennan, Blackmun and Marshall, argued that the statute could be upheld under the *Morton* rule because the congressional intent was to tolerate the state activity at issue in the instant case. 99 S. Ct. at 1344 (Brennan, J., concurring in result); *id.* at 1346 (Blackmun, J., concurring in judgment). The dissenting Justices, Powell, Stewart and Chief Justice Burger, argued that the statute should fall under the *Morton* analysis because the intent of Congress was not, according to the dissenters, to tolerate this type of state action. *Id.* at 1351-52 (Powell, J., dissenting). Thus, six Justices agreed that the instant case fell within the perimeters of the *Morton* rule.

[70] *Id.* at 1339-41. The Court relied upon the analysis of the Social Security Act used in Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977), and its own study of the congressional history of the NLRA. 99 S. Ct. at 1341-42. See notes 60 through 64 and accompanying text *supra.* Certain techniques recommended in *Hodory,* such as consideration of the manner in which Congress treated analogous programs, were also employed. See note 51 and accompanying text *supra.*

[71] 99 S. Ct. at 1341. This is the second exception to the *Garmon* rule. See note 25 and accompanying text *supra.*

Concurring in the judgment, Justice Blackmun asserted that since the Court has held that a state interest is deeply rooted in local responsibility only when the circumstances are exceptional, see note 25 *supra,* then state interest in unemployment insurance is not a deeply rooted state interest and thus does not fit into this exception to the *Garmon* principle. 99 S. Ct. at 1345. Yet since Congress intended to allow state regulation of this

employment insurance is an interest deeply rooted in local concern, then, in the absence of a compelling congressional directive to the contrary, legislative intent to preempt will not be inferred.[72]

Justices Powell and Stewart, joined by Chief Justice Burger, dissented. Employing a pure *Morton* analysis, they contended that since New York's statute[73] tipped the finely-balanced relationship between labor and management and since there was no discernible unambiguous congressional intent to allow the states to upset the collective bargaining relationship by compensating strikers, the Court should hold the New York statute preempted.[74]

The instant case resolves the issue of whether a state may pay unemployment insurance to strikers. Unfortunately, it resolves nothing more and only adds confusion to an already complex area of the law. Prior to this opinion, state regulation of labor activities was generally held to be preempted if the regulated activity was, under the *Garmon* rule, even arguably protected or prohibited by either section 7 or section 8 of the NLRA.[75] If the activity was not arguably within the protection of either section 7 or 8, then the *Morton-Lodge* analysis was appropriate; that is, state action that interfered with the effectuation of congressional purpose was preempted.[76] The instant case seemingly falls within the *Morton-Lodge* rule since neither the payment nor receipt of unemployment insurance is arguably covered by either section 7 or 8. Indeed, the concurring and dissenting Justices in the instant case argued for application of the *Morton* test to New York's unemployment compensation scheme.[77] Yet the plurality unexpectedly found the state activities in the instant case distinguishable from those involved in *Morton*[78] and *Lodge*,[79] holding that New York's statute was generally applicable to the

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activity, Justice Blackmun argued, application of the *Morton* test would still resolve the preemption issue in favor of state law. Justice Blackmun also expressed concern over the differing basic premises in *Garmon* and *Lodge*. In the former, the premise was "one of assumed priority on the State side" since there was no preemption unless compelling congressional direction indicated otherwise. *Id.* at 1346. In the latter, the premise was "one of assumed priority on the federal side." *Id.* For Justices Blackmun and Marshall, this distinction was not merely a matter of semantics. In the *Lodge* approach, with authority being assumed on the federal side, preemption could be found even in the absence of compelling congressional directive. *Id.*

[72] 99 S. Ct. at 1346.

[73] *Id.* at 1349-50.

[74] *Id.* at 1353-54.

[75] See notes 21 through 25 and accompanying text *supra*.

[76] See note 37 and accompanying text *supra*.

[77] See note 72 *supra*.

[78] See notes 27 & 28 and accompanying text *supra*.

[79] See notes 34 & 35 and accompanying text *supra*.

public[80] and regulated only public conduct.[81] In finding *Morton* inapplicable,[82] the plurality created confusion throughout the field of labor law preemption.

Two new elements of preemption analysis make the instant case unusual and interesting: first, the distinction the plurality drew between laws of general applicability and those aimed solely at the regulation of labor-management relations;[83] and second, the distinction between laws that manage public conduct and those that control private conduct.[84] Since only three Justices agreed that these distinctions were so important that preemption analysis must be retailored to fit them,[85] the traditional *Morton* rule appears more reliable.[86] This is especially true, as Justice Brennan hinted,[86] since the plurality failed to articulate thoroughly why these distinctions were important enough to warrant application of a different rule. In the future, however, the Court may refine these distinctions, and they could become the crucial point of inquiry not only in labor cases but in all federal preemption analyses. Certainly, with the renewed interest in states' rights,[87] such distinctions would add comity to federal-state relations and allow for more concurrent state and federal legislation.

The instant decision is also unusual because of the Court's finding that congressional sensitivity to states' interests in formulating suitable unemployment compensation schemes[88] makes unemployment compensation a deeply rooted local concern over which congressional intent to preempt will not be inferred in the absence of a compelling legislative directive to the contrary.[89] This is the second exception to the *Garmon* rule,[90] and had been narrowly interpreted previously by the Court.[91] Like the distinctions drawn by the plurality between *Morton* and the instant case, use of the *Garmon* exception does not stand on solid ground. Only three Justices agreed that it was applicable in the instant case. Moreover, the impact of the plurality's expansive reading of the *Garmon*

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[80] See note 71 and accompanying text *supra.*

[81] See note 70 and accompanying text *supra.*

[82] See notes 69 through 72 and accompanying text *supra.*

[83] See notes 67 & 68 and accompanying text *supra.*

[84] See notes 70 & 71 and accompanying text *supra.*

[85] See note 72 *supra.*

[86] See note 71 *supra.*

[87] *See* National League of Cities v. Usury, 426 U.S. 833, 851-52 (1976)(federal minimum wage and maximum hour provisions do not apply to state and municipal employees).

[88] 99 S. Ct. at 1341.

[89] See note 26 and accompanying text *supra.*

[90] See note 25 *supra.*

[91] Lesnik, *supra* note 21, at 470.

exception is confusing because the *Garmon* rule has traditionally represented an enlargement of the federal preemption doctrine.[92] Here, however, it was used to uphold state power. If the expansion of the *Garmon* exception were to receive strong judicial approval, it would become a classic example of the exception to the rule's being more important than the rule itself.

The new techniques applied in the instant case and in *Ohio Bureau of Unemployment v. Hodory*[93] will have more immediate impact on the field of labor preemption than will the distinctions between statutes of general applicability and those regulating labor-management relations or the expansion of the *Garmon* rule. According to this new approach, explicit expressions are not necessary to show unambiguous intent. Congressional silence may be indicative of an intention to leave a matter completely unregulated or to leave it within state jurisdiction. Furthermore, analogous programs may also reveal congressional motive.[94] These techniques for establishing congressional intent should be considered by every attorney involved in litigation that concerns federal legislation.

As a practical matter, the Court must have entertained some public policy considerations. In the instant case a corporation indirectly funded unemployment benefits paid to their own striking employees. Although for obvious reasons this notion offends many people, the real cost of the benefits falls not upon the employer but upon the general public. The employers may simply pass the costs to the consumer through higher prices for goods and services.[95] It is also probably true that any public assistance to striking employees affects the duration of the strike and the bargaining power of labor and management.[96] Yet only two states have chosen expressly to include strikers as eligible for compensation.[97] Deference to state power in such a limited situation does not seem unreasonable.[98]

I. Elizabeth Jones

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[92] *Id.*

[93] 431 U.S. 471 (1977); *see* 99 S. Ct. 1328, 1343-44 n.44.

[94] See note 51 and accompanying text *supra.*

[95] A. THEIBLOT AND R. COWIN, *supra* note 46, at 218-20.

[96] *Id.* at 220.

[97] See note 48 *supra.*

[98] While the Court resolved the issue of whether unemployment insurance paid to strikers is preempted by national labor policy, New York and Rhode Island's legislatures must decide whether the continuation of such payments comports with their states' public policy.

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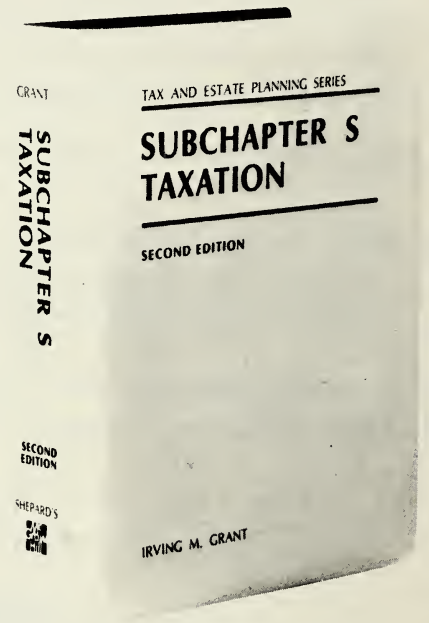

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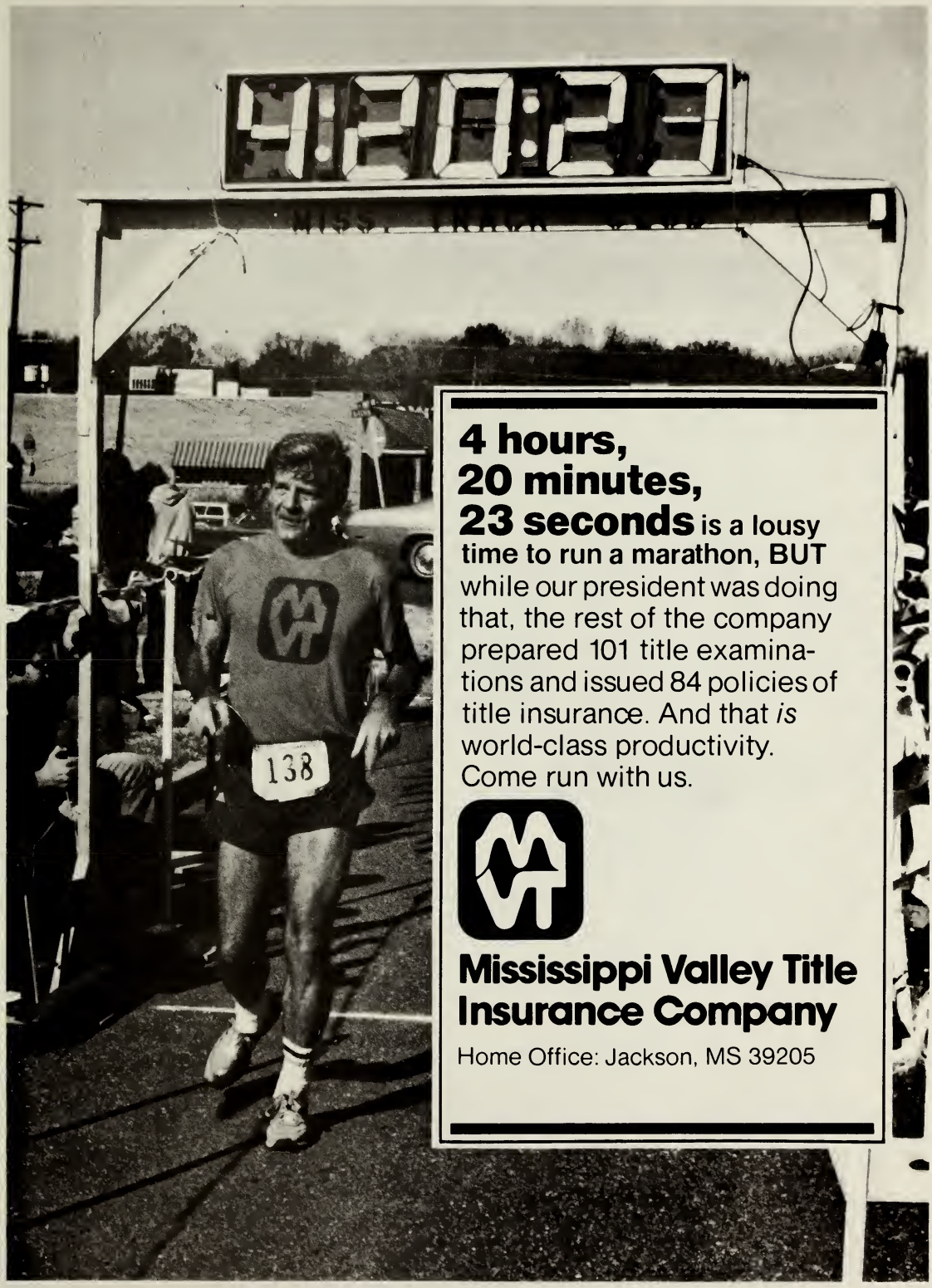

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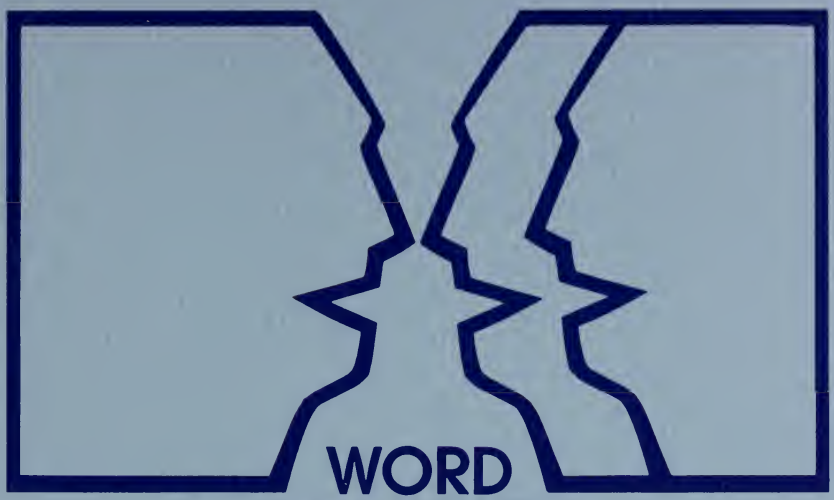

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